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In The

Supreme Court of the United States

ECHOSTAR COMMUNICATIONS CORPORATION, et al.,

Petitioners,

v.

CBS BROADCASTING INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is 17 U.S.C. § 119(a)(2)(B), part of the Satellite Home Viewer Act of 1988, an unconstitutional abridgement of speech under the First Amendment because (a) it is a content-based, speaker-specific restriction that implements a congressional preference for the speech of local television broadcasters by requiring satellite carriers to block distant broadcast signals from all but a small group of households that would otherwise receive them, and (b) it is not narrowly tailored to a substantial governmental interest and therefore fails intermediate First Amendment scrutiny?

2. Is § 119(a)(2)(B) categorically immune from First Amendment scrutiny because it is structured as an exception to a statutory copyright license, a question related to the second question presented in *Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 534 U.S. ___ (U.S. Feb. 19, 2002) (No. 01-618)?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are EchoStar Communications Corporation, d/b/a DISH Network; EchoStar Satellite Corporation; Satellite Communications Operating Corporation; and DirectSat Corporation.

Respondents are CBS Broadcasting Inc.; Fox Broadcasting Company; ABC, Inc.; National Broadcasting Company, Inc.; CBS Television Network Affiliates Association; FBC Television Affiliates Association; ABC Television Affiliates Association; NBC Television Affiliates; and the United States of America.

Petitioner EchoStar Communications Corporation, d/b/a DISH Network, is a publicly held corporation that has issued securities to the public. Financiere De Videocommunication owns 10 percent or more of petitioner EchoStar Communications Corporation's stock. Financiere De Videocommunication is a wholly owned subsidiary of Groupe Canal+, which in turn is a wholly owned subsidiary of Vivendi Universal. Vivendi Universal has issued securities to the public. Petitioner EchoStar Satellite Corporation is a subsidiary of EchoStar Broadband Corporation, which in turn is a subsidiary of EchoStar Communications Corporation. Petitioner Satellite Communications Operating Corporation is a subsidiary of EchoStar Communications Corporation. Petitioner DirectSat Corporation was a subsidiary of, but merged into, EchoStar Satellite Corporation, effective March 12, 1999.

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Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (Oct. 2001) 15, 18, 27

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") is reported at 265 F.3d 1193 (11th Cir. 2001), and reprinted at Pet. App. 1a-45a. The Eleventh Circuit's Orders staying the preliminary injunction pending appeal and denying the petition for rehearing and rehearing *en banc* are reprinted at Pet. App. 107a-108a and 109a-111a, respectively. The United States District Court for the Southern District of Florida's Orders granting preliminary injunction, the Preliminary Injunction, and the Amended Preliminary Injunction are unreported and are reprinted at Pet. App. 46a-72a, 73a-85a, and 86a-98a, respectively. The district court's Order denying stay and further amending its Preliminary Injunction is appended at Pet. App. 99a-106a.

STATEMENT OF JURISDICTION

The Eleventh Circuit's decision was entered on September 17, 2001. Petitioners' timely petition for rehearing and rehearing *en banc* was denied on December 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Pursuant to Rule 29.4(b), petitioners state that the Eleventh Circuit granted the motion of the United States of America to defend the constitutionality of the Federal Act under 28 U.S.C. § 2403(a), and that the United States is a party to this action as a respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the

press. . . . " U.S. Const. amend. I. The full text is set forth in Pet. App. 112a. The Copyright Clause provides that "Congress shall have the power . . . to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The full text is set forth in Pet. App. 112a. The pertinent statutory provisions, 17 U.S.C. § 119, 17 U.S.C. § 122, 47 U.S.C. § 338 and 47 U.S.C. § 339, are set forth at Pet. App. 113a-142a.

STATEMENT OF THE CASE

A. Introduction.

This case presents a First Amendment challenge to 17 U.S.C. § 119(a)(2)(B), part of the Satellite Home Viewer Act of 1988 ("SHVA"), as amended.[1] The statute impermissibly favors local programming by precluding satellite carriers from offering distant network programming to "served households" as defined in the statute. *See* 17 U.S.C. § 119(a)(2)(B) & (d)(10). The so-called "unserved household" restriction, which prefers "local" broadcast programming to "distant" programming, is demonstrably content-based. It deprives millions of American households of the opportunity to obtain distant network programming and reflects a paternalistic governmental judgment that viewers should watch local programming even if they prefer distant network programming.

The court of appeals sustained the statute by misapplying this Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). The Court should grant review to establish

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[1] This petition raises no question regarding SHVA's provisions for retransmission of "superstations" and Public Broadcasting Service programming. *See* 17 U.S.C. § 119(a)(1).

the proposition that a speaker-specific, content-based statute designed to favor "local" broadcast television over "distant" broadcast television contravenes the First Amendment.

The court of appeals also treated 17 U.S.C. § 119(a)(2)(B) as if it were not a restriction on speech: "the Act does not threaten [EchoStar's] free speech rights but actually permits more speech than EchoStar would constitutionally be entitled to under the Copyright Act." Pet. App. 34a. This Court should grant review to establish that First Amendment protections cannot be circumvented through the artifice of a statutory copyright license. The fallacy in the court of appeals' elevation of form over substance is confirmed by this Court's recognition of the intersection between First Amendment and copyright principles in granting certiorari in *Eldred v. Ashcroft*, 239 F.3d 372, 375 (D.C. Cir. 2001), *cert. granted*, 534 U.S. ___ (U.S. Feb. 19, 2002) (No. 01-618), which presents the question (in Question 2 of the Questions Presented) of whether the Copyright Term Extension Act of 1998 is "categorically immune from challenges under the First Amendment." The certiorari petition in *Eldred* cited the Eleventh Circuit's opinion in this very case as evidence of a circuit split on copyright issues. At minimum, if plenary review is not granted outright, this petition for certiorari should be held in abeyance pending the disposition of *Eldred*.

B. The Statutory Copyright License.

Section 119(a)(2)(A) licenses satellite companies to retransmit network broadcast stations' programming without having to negotiate separate permission from each holder of a copyright interest in each individual program. Congress protected the interests of such holders by requiring payment of a statutory royalty for each recipient of each program. *See* 17 U.S.C. § 119(b). The statute was remedial, for Congress recognized that broadcast networks

and their affiliates were unfairly restricting access to network programming and were collectively refusing to negotiate with satellite providers for retransmission rights to network signals.

Section 119(a)(2)(B), however, excludes "served" households from that license. Section 119(a)(2)(B) specifies:

> The statutory license provided for in subparagraph (A) shall be limited to secondary transmission to persons who reside in unserved households.

Section 119(d)(10) defines an "unserved household" as one that:

> (A) Cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity . . . of a primary network station affiliated with that network. . . .

Signal strength is determined separately for each network at each household, creating a significant administrative burden for carriers.

By contrast, cable companies had enjoyed a much broader statutory license for twelve years under the Copyright Act of 1976, 17 U.S.C. § 111, which they successfully wielded to obtain a market share of 80% of U.S. households that subscribe to multichannel television programming. Satellite carriers, however, received a license of considerably narrower scope than that afforded to cable companies.

The statute limits satellite retransmission to the "small percentage of television households [that] cannot now receive clear signals embodying the programming of the three national television networks." H.R. Rep. No. 100-887, pt. I at 18 (1988). The plain purpose of that limitation is to protect local network stations and local programming. Congress was concerned that if satellite carriers transmitted distant network signals to households already "served" by local network stations, the result would be "an erosion of audiences for such local stations because

their programming would no longer be unique and distinctive." H.R. Rep. No. 100-887, pt. II, at 26. Congress reaffirmed this purpose in 1994 when it extended the original six-year license, stating:

> In order to protect local network stations from the importation of distant network stations of the same network, the Act restricts such importation to those households that cannot receive a particular local network station either through over-the-air antennas or cable.

H.R. Rep. No. 103-703, at 6 (1994) (footnote omitted).

To comply with § 119, EchoStar was forced to block most of its subscribers from receiving the many network stations it carries.[2] "Unserved" households could lawfully receive such signals from any network station, whether distant or local, but "served" households could receive no network broadcasting by satellite. Thus, distant and local network stations were both available to "unserved" satellite subscribers, whereas the only options for "served" households were local network affiliates, viewed over-the-air or by cable.

The Satellite Home Viewer Improvement Act of 1999 (hereinafter "SHVIA") revised the licensing scheme, amending both the Copyright Act (Title 17 U.S. Code) and the Communications Act (Title 47 U.S. Code).[3] The SHVIA continued to restrict the satellite carriers' copyright license

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[2] Satellite programming (for example, HBO) is available to all households that have compatible receivers. Thus, to limit access (for example, to only those paying the additional fee for HBO), EchoStar must block the ability of the receiving equipment (the satellite dish and box in the home) to accept and convert into viewable form the signal for that channel. The "unserved household" restriction thus requires that each "served" household's receiving equipment block the network stations' signals.

[3] The SHVIA comprised Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501.

under § 119 to "unserved households," and to define "unserved households" as those unable to receive a Grade B signal from a local network broadcast station. 17 U.S.C. §§ 119(a)(2)(B), 119(d)(10), 47 U.S.C. § 339(b).

At the same time, the SHVIA created a new and additional statutory license permitting retransmission of *local* broadcast programming without regard to the "served" or "unserved" nature of the subscribing household, and without any obligation to pay royalties. 17 U.S.C. § 122. This "local-into-local" copyright license is conditioned on a carrier's retransmitting all the requesting broadcast stations in any local market where it uses the "local-into-local" license. 47 U.S.C. § 338. The Conference Report on the 1999 amendments explained the new license:

> [T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television stations to subscribers who reside in the local markets of those stations.

H.R. Rep. No. 106-464, at 92 (1999). With respect to distant network retransmissions, it retained the limited license of § 119 for distant network service only "to those homes which cannot receive the local network television stations." *Id.* at 93.

Congress recognized in 1999 that many "unserved" homes would actually be able to receive local network programming under the new "local-into-local" license. 47 U.S.C. § 339(a)(1)(B). Nonetheless, the definition of "unserved" remains the sole determinant of a satellite

customer's ability to subscribe to distant network programming. As amended in 1999, therefore, the SHVIA provides satellite carriers with two conditional copyright licenses:

- Under § 122, a license to retransmit *local* network broadcast programming royalty-free to all households in a licensed market; and
- Under § 119, a paid license to retransmit *distant* network programming, but only to "unserved" households – even if those households can and do receive local network programming via satellite under the § 122 license.

A satellite carrier is forbidden from retransmitting *distant* network programming to households that are outside the statutory definition of "unserved."

The practical effect of the statutory scheme is to silence a substantial amount of speech and to establish a paternalistic governmental preference for local broadcasting content. The scheme potentially affects not only the 17 million existing satellite viewers,[4] but the untold millions more who either do not subscribe to a satellite carrier because they would be ineligible to receive distant network programming or who subscribe but are nonetheless denied the distant programming of their preference. To comply with the restrictions on its speech, EchoStar must carry all requesting broadcast stations for each of the 35 local markets it serves, and at the same time it must block subscribers from receiving those stations that are outside their own local markets. Viewers who meet the definition

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[4] *See* DIRECTV Press Release, *DIRECTV Announces Fourth Quarter and Year-End 2001 Subscriber Growth; Strong Performance Exceeds Expectations; DIRECTV Ends Year with 10.7 Million Customers* (Jan. 8, 2002); *see also* EchoStar Press Release, *EchoStar Reports Record Fourth Quarter Revenue, EBITDA; EchoStar's DISH Network Satellite TV Service Reaches 7 Million Customer Milestone* (Feb. 28, 2002).

of "unserved households" can subscribe to such distant broadcast programming; the rest cannot.

C. Course of Proceedings and Disposition Below.

On November 5, 1998, respondents, composed of the major networks and associations of network affiliates (collectively, "the Networks"), filed their lawsuit below, alleging that EchoStar was providing distant network programming to "served" households in violation of the SHVA and seeking a nationwide preliminary injunction. On September 17, 1999, EchoStar moved for judgment on the pleadings on the ground that the "unserved household" restriction violates the First Amendment.

On September 29, 2000, the district court granted a nationwide preliminary injunction, and, in so doing, denied EchoStar's motion for judgment on the pleadings. The district court's entire First Amendment discussion was:

> In effect, EchoStar seeks to "make commercial use of the copyrighted works of others. There is no first amendment right to do so." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989). Therefore, the Court will deny EchoStar's Motion.

Pet. App. 68a-69a.

EchoStar timely appealed, and the court of appeals reversed and vacated the injunction, remanding for an evidentiary hearing on the injunction issues. With respect to the First Amendment, however, the court of appeals ruled on the merits that 17 U.S.C. § 119(a)(2)(B) is constitutional. Pet. App. 32a-39a. The court of appeals was openly dubious that EchoStar could assert any First Amendment claim at all, opining that *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), "rejected the suggestion that the First Amendment requires broader exceptions to the copyright laws than those explicitly conferred by Congress." Pet. App. 33a.

The court of appeals nonetheless purported to evaluate the "unserved household" restriction under the intermediate First Amendment scrutiny prescribed by *United States v. O'Brien*, 391 U.S. 367, 377 (1968). It had no evidentiary record on which to base such an evaluation; the district court had merely declined to grant EchoStar's motion for judgment on the pleadings. Even so, the court of appeals found that the restriction on distant broadcast network retransmission serves "the limited goal of providing access to network programming for households that cannot otherwise receive such programming, . . . while creating the least possible interference with the Networks' copyrights." Pet. App. 36a. It asserted that "[s]uch precise tailoring certainly survives scrutiny, intermediate or otherwise," and thus pronounced EchoStar's First Amendment challenge "meritless." *Id.* at 38a-39a.

The court of appeals directed the district court to apply 17 U.S.C. § 119(a)(2)(B) to EchoStar on remand. The district court will do so as part of an evidentiary hearing to be conducted on the requested injunction. The court of appeals has conclusively resolved EchoStar's constitutional objections.

EchoStar sought rehearing and rehearing *en banc* of the First Amendment question on October 9, 2001, which the Eleventh Circuit denied without opinion on December 28, 2001. Pet. App. 109a-111a.

REASONS FOR GRANTING THE PETITION

This case squarely presents the issue this Court reserved in *Turner I*, 512 U.S. 622 (1994), and *Turner II*, 520 U.S. 180 (1997): whether a statute designed to promote "local" broadcast television content at the expense of "distant" broadcast speech contravenes the First Amendment. The Eleventh Circuit summarily upheld such a speaker-specific statutory scheme, one avowedly designed to limit "distant" broadcast speech in favor of "local" broadcast television, even though all of the Justices writing in *Turner I* indicated that such a law would impose what they

deemed a content-based restriction on protected speech.[5] This Court should grant review to establish that the challenged statute, 17 U.S.C. § 119(a)(2)(B), is invalid under the First Amendment.

This Court should also grant review because the court of appeals promulgated a new standard for judging content-neutral restrictions on speech under intermediate First Amendment scrutiny. The court of appeals upheld 17 U.S.C. § 119(a)(2)(B) without demanding any substantial, non-speculative evidence of an important governmental interest to which the restriction on speech was narrowly tailored.

Finally, review should be granted to establish that § 119(a)(2)(B) is not immune from First Amendment scrutiny simply because it is structured as an exception to a statutory copyright license. The Eleventh Circuit's holding that the statute "does not threaten [EchoStar's] free speech rights" (Pet. App. 34a) elevates form over substance and ignores the statute's practical effect on expression. It also raises questions akin to those posed in *Eldred*.

If the ruling below is allowed to stand, satellite carriers and viewers will continue to have their television programming options curtailed by a licensing scheme that dramatically reduces the total amount and variety of available speech. The statute prefers local over distant programming, "unserved" viewers over "served" viewers, and cable television operators over competing satellite carriers. The question presented thus has enormous implications for millions of viewers and for the marketplace of ideas available to the American public.

Absent review by this Court, the Eleventh Circuit's decision will be the last word on the First Amendment rights of satellite carriers. Together, EchoStar and

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[5] *See Turner I*, 512 U.S. at 643 n.6 (dictum) (Justices Kennedy, Rehnquist, Blackmun, Stevens and Souter); 512 U.S. at 676-78 (Justices O'Connor, Scalia, Thomas and Ginsburg); 512 U.S. at 688 (Justice Ginsburg).

DIRECTV hold the licenses for all 96 available frequencies for the provision of direct broadcast satellite service across the continental United States. EchoStar and the parent of DIRECTV have agreed to merge the two satellite carriers into one entity, subject to review by the Federal Communications Commission ("FCC") and antitrust regulators. Accordingly, it is highly unlikely that any other court of appeals will ever be presented with the questions raised here.

This Court's review is urgently warranted. At minimum, the petition for certiorari should be held in abeyance pending the disposition of *Eldred*.

I. Review Is Necessary To Establish That A Speaker-Specific Restriction On "Distant" Broadcast Speech In Order To Promote "Local" Broadcasting Content Is A Content-Based Limit On Speech That Triggers Strict First Amendment Scrutiny.

Retransmission of television programming is speech entitled to First Amendment protection. The Eleventh Circuit was unwilling to hold at the threshold that EchoStar's programming actually constitutes "speech" or that the challenged statute imposes any burden on speech, Pet. App. 34a n.22, 38a n.24. In that respect, the decision below squarely conflicts with this Court's decisions in *Turner Broadcasting*. As the Fourth Circuit recently observed in *Satellite Broadcasting & Communications Association v. FCC*, 275 F.3d 337 (4th Cir. 2001), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. March 7, 2002) (No. 01-1332), which addressed a First Amendment challenge to a different section of the SHVIA:

> [B]oth satellite carriers and cable operators engage in speech protected by the First Amendment when they exercise editorial discretion over the menu of channels they offer to their subscribers. Insofar as the carry one, carry all rule seeks to influence the exercise of that discretion,

> it is open to challenge under the First Amendment.

Id. at 352-53 (citation omitted).

The role of satellite carriers in selecting which stations and programming to carry is equivalent to that of the cable operators the Court discussed in *Turner I*, where all nine Justices agreed:

> There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "seek to communicate messages on a wide variety of topics and in a wide variety of formats."

Id. at 636 (citations omitted). As Justice O'Connor explained in her separate opinion,

> Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place.

Id. at 675 (O'Connor, J., concurring in part and dissenting in part). *Accord, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). The programming choices made by satellite carriers and viewers are no less valuable under the First Amendment than those of cable operators and cable viewers, or those of publishers and readers. Any other view would conflict with the premise underlying the second question presented by *Eldred*, which involves the First Amendment protection to which retransmission of copyrighted material is entitled in light of the Copyright Term Extension Act of 1998. As a content-based restriction that discriminates between classes of speakers, § 119(a)(2)(B) demands strict scrutiny.

A) The Statute Is A Content-Based Restriction That Violates The First Amendment.

The statutory scheme here recognizes two distinct categories of satellite programming, distant and local, and accords them radically different treatment. Under § 122, local programming can be provided royalty-free to all households, without regard to the strength of the broadcast signal each household receives. Distant programming, on the other hand, may be offered under § 119 only to those subscribers meeting the complex definition of "unserved," and then only for a fee. The statutory scheme prevents satellite carriers from providing "distant" speech to households that are deemed "served."

The effect of this distinction is magnified by the SHVIA. Under 47 U.S.C. § 338, a satellite carrier using the § 122 local programming license must carry the signals of all requesting local stations in each area where it carries one such station. Section 119(a)(2)(B), however, prohibits a carrier from transmitting these same signals to its customers in other parts of the country unless they are "unserved." This compels EchoStar to block the signals of numerous broadcast stations from all but a select few of its subscribers outside each station's local area. This scheme thus limits the total broadcast transmissions available to the vast majority of satellite subscribers, requiring them to accept only local network programming when they could easily receive distant network programming as well.

This reduction in the quantity and variety of speech available to satellite customers is based solely on whether network programming is distant or local. "Served" households have fewer total sources of information and cannot opt for distant broadcast variants in lieu of or in addition to their local network stations.

The indisputable basis for the restrictions on "distant" programming is Congress' preference for the content of local television broadcasters: "[Local] stations provide programming tailored to local needs, such as news, weather,

special announcements and information related to local activities." H.R. Rep. No. 106-464, at 92 (1999). Further:

> when a satellite television operator distributes out-of-market, or distant, network signals to households that can otherwise receive local signals over-the-air, the local broadcast station's viewership (and hence, advertising revenue) necessarily declines. The unserved household limitation therefore has helped to preserve local affiliates' bargained-for exclusivity, and in doing so, promoted the development of local programming and free, over-the-air television.

H.R. Rep. No. 106-79, at 13 (1999).[6] When the SHVIA combined the restricted license for distant programming with an unrestricted royalty-free license for local programming, the Conference Committee said the resulting system "furthers the congressional policy of localism and diversity of broadcast programming, which provides locally-relevant news, weather, and information. . . . " H.R. Rep. No. 106-464, at 102.[7]

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[6] The House Commerce Committee report addressed an alternate bill, proposed H.R. 851, which would have removed the "unserved household" restriction and provided a nationwide copyright license for both local and distant satellite programming. The bill called for equalizing the copyright licenses on the ground that "[i]t is illogical to place territorial restrictions on compulsory licenses, given that they are designed to effectuate telecommunications policy goals (e.g., localism, and the viability of free, over-the-air television), and not copyright interests." H.R. Rep. No. 106-79, at 26. House Report 851 would have required the FCC to issue regulations similar to those governing cable operators. *Id.* at 25-26. House Report 851 would have served the interest of protecting local stations through exclusivity rules, but would have been less restrictive of protected speech than the "unserved households" limitation.

[7] As the House Commerce Committee acknowledged, note 6 *supra*, these stated goals have nothing to do with the exercise of powers granted to Congress under the Copyright Clause. Thus, it

This legislative history confirms what the very nature of the statute reflects: Congress chose to restrict distant satellite retransmissions out of concern that, if given a choice, satellite viewers might prefer distant content over that of their own local stations. Acting out of a misplaced paternalism, Congress declined to allow viewers that choice.[8] Its licensing scheme is therefore facially content-based under this Court's *Turner* decisions.

In *Turner I*, all members of the Court recognized that programming addressing "local news and informational needs" represents a content-based category of speech. The majority made this observation in describing two statutory provisions that would require cable companies to carry certain otherwise ineligible broadcast stations based on FCC findings addressing "local news and informational needs" and giving "attention to the value of localism." *Turner I*, 512 U.S. at 643 n.6. The majority said, "We recognize that this aspect of [the challenged statute] appears to single out certain low-power broadcasters for special benefits on the basis of content." *Id.*[9] Justice O'Connor's

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is questionable whether the "unserved household" restriction was even within Congress' power to enact. *See* Lawrence Lessig, *Lecture: Copyright's First Amendment*, 48 U.C.L.A. L. Rev. 1057, 1062 (June 2001); *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 73 (Oct. 2001).

[8] By co-opting viewers' choices, Congress disregarded the basic tenet of First Amendment jurisprudence "that government officials should treat citizens as fundamentally rational, autonomous agents, capable of weighing the value and probity of speech for themselves." Netanel, 54 Stan. L. Rev. at 34. If local programming is as valuable and desirable as Congress has posited, then its viewership would not "necessarily decline" in the face of available distant programming, as Congress assumed. *Cf.* H.R. Rep. No. 106-79, at 13.

[9] The Court did not deal with this issue directly because the district court had not addressed it and the parties gave it only "glancing reference." *Turner I*, 512 U.S. at 643-644 n.6. The

opinion for four members of the Court was more explicit.[10] Believing that the entire statute reflected a purpose to promote local broadcasting, she characterized such a purpose by saying:

> Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.

Turner I, 512 U.S. at 677 (O'Connor, J., concurring in part and dissenting in part). *Accord, id.* at 686 (Ginsburg, J., concurring in part and dissenting in part) ("[A]n intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress' evident plan to advance local programming."); *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 20 (1986) (plurality opinion) ("the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not – and does not purport to be – content neutral"); *First Nat'l Bank of Boston v. Bellotti*,

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majority found that the remaining must-carry rules did not trigger strict scrutiny because Congress had acted *not* to manipulate locally available content but rather to ensure the continued availability of free over-the-air television programming for those who did not subscribe to cable, by safeguarding the economic viability of the over-the-air stations. *See Turner I*, 512 U.S. at 646; *see also id.* at 649, 652, 658-59; *Turner II*, 520 U.S. at 225-29 (Breyer, J., concurring in part). As the Court later summarized, "[t]he Government's interest in *Turner Broadcasting* was not the alteration of speech." *Hurley*, 515 U.S. at 577.

[10] Justices Scalia and Ginsburg joined in Justice O'Connor's separate opinion, and Justice Thomas joined in the portion relevant here. *Turner I*, 512 U.S. at 674.

435 U.S. 765 n.30 (1978) (governmental attempt to restrict the voices of some in order to "enhance the relative voices" of less readily heard speakers "contradicts basic tenets of First Amendment jurisprudence") (internal quotation marks omitted); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1131 (D.C. Cir. 2001) (regulation of cable operators "solely in the interest of diversity" lies at "the outer limits of Congress' power").

Because § 119(a)(2)(B) put in place a content-based system of copyright licensing that restricts speech, it demands strict scrutiny under the First Amendment. The Eleventh Circuit's decision presents this Court with the opportunity to resolve the issues left open in the *Turner Broadcasting* decisions regarding the government's authority to restrict speech in the name of broadcast "localism."

B) Section 119(a)(2)(B) Warrants Strict Scrutiny Because It Singles Out Particular Speakers For Restriction.

This Court's review is also called for because of the speaker-specific nature of the restriction on speech. While "served" satellite subscribers are precluded from receiving distant network broadcasts, the same is not true for cable subscribers. The copyright license for cable operators, in 17 U.S.C. § 111, contains no "unserved household" limitation, nor any similar distinction between cable operators' license to transmit local programming and their license to transmit distant programming.

As this Court has observed, "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns," for they "threaten[ ] to 'distort the market for ideas.' " *Turner I*, 512 U.S. at 659, 660 (quoting *Leathers v. Medlock*, 499 U.S. 439, 448 (1991)). "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000). Speaker-specific restrictions on

expression have always triggered exacting First Amendment scrutiny, for "[i]n the realm of protected speech, the [government] is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public issue.*" *Bellotti*, 435 U.S. at 784-85 (emphasis added).[11]

In imposing a disproportionate burden on one group of speakers, the "unserved household" restriction ultimately limits the choices available to *listeners*. And, like the selective tax exemptions held invalid in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), this selective license scheme, by granting preferential treatment to cable operators, necessarily causes concern about improper government motive. *See* Netanel, 54 Stan. L. Rev. at 59. Absent any "special characteristic" of satellite carriers justifying the distinction,[12] the very fact of such differential treatment

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[11] *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (describing *Bellotti* as involving a "speaker-based restriction"); *Madison Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (public board may not "discriminate between speakers" at its meetings); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."); *Ruggiero v. FCC*, 278 F.3d 1323, 1330 (D.C. Cir. Feb. 8, 2002) (invalidating as First Amendment and equal protection violation federal statute prohibiting anyone who had ever operated unlicensed station from obtaining low-power FM radio license, "as it restricts future lawful speech (licensed broadcasting) and applies to a limited class.").

[12] No justification for the discrimination was offered or considered below. Moreover, Congressional statements about the SHVIA belie the possibility that any "justified differential" exists. The Conference Committee stated to the contrary that "[t]he proposed licenses place satellite carrier [sic] in a

"suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585.

The Eleventh Circuit never demanded any explanation for the discriminatory treatment of speech by satellite carriers. Accordingly, this Court's plenary review is required.

II. Review Is Warranted Because the Eleventh Circuit Articulated A New, Watered-Down Version of Intermediate Scrutiny.

Although the court of appeals purported to apply the intermediate scrutiny standards of *O'Brien*, 391 U.S. 367 (1968), in fact the court of appeals created a wholly new test that conflicts with decisions of this Court and with decisions in other circuits. Under *O'Brien*, a statute regulating conduct in a manner that affects expression comports with the First Amendment only if: (1) it furthers an important or substantial governmental interest; (2) the governmental interest is unrelated to the suppression of free expression; and (3) the incidental restriction on speech is no greater than is essential to the furtherance of that interest. 391 U.S. at 377; *see also Turner I*, 512 U.S. at 661-62; *Turner II*, 520 U.S. at 189; *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989).

The burden of meeting these standards is on the proponents of the challenged law. At the threshold, they "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664-65. Further, they must show that "Congress has drawn reasonable inferences based on substantial evidence," for "[w]hen trenching on first amendment interests, even incidentally, the government must be able

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comparable position to cable systems, competing for the same customers." H.R. Rep. No. 106-464, at 101.

to adduce either empirical support or at least sound reasoning on behalf of its measures." *Turner I*, 512 U.S. at 666 (citations omitted) (quoting *Century Communications, Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987)); *see also Turner II*, 520 U.S. at 195 and 237 (O'Connor, J.) (citations omitted). Even in the commercial speech context, this Court has instructed that the government's burden "is not satisfied by mere speculation or conjecture," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).[13]

The court of appeals minted a new standard that does not comply with any of these requirements. The court of appeals itself described the record as "sparse." Pet. App.

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[13] *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 2425 (2001) (invalidating restriction on speech where the government did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed by the regulations," even though the government adduced numerous empirical studies and extensive market data to support its judgment) (internal quotation omitted); *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 1764 n.18 (2001) ("mere speculation or conjecture" insufficient); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Ibanez v. Florida Dept. of Bus. & Prof'l Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. Feb. 19, 2002) (FCC's failure to repeal national television station ownership rule and cable/broadcast cross-ownership rule was arbitrary and capricious in violation of APA); *Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (invalidating a regulation of chiropractors' advertising, which was based on nothing beyond "common sense" and anecdotal evidence); *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998) (rejecting proposed governmental interest due to state's failure to proffer evidence to support it); *Harman v. City of New York*, 140 F.3d 111, 122 (2d Cir. 1998) ("the government cannot rely on assertions, but must show a basis in fact for its concerns").

32a. Yet, the court of appeals demanded neither "empirical support" nor "sound reasoning" to justify the "unserved household" restriction. In fact, the record contains no evidence at all in support of the challenged law, and there is no legitimate basis here for concluding that such a restriction satisfies any of the three *O'Brien* elements. The court of appeals' approach amounts to ill-disguised rationality review.

The court of appeals declared that the restriction serves "the limited goal of providing access to network programming for households that cannot otherwise receive such programming, . . . while creating the least possible interference with the Networks' copyrights." Pet. App. 36a. Certainly, the *license* in § 119(a)(2)(A) expands network programming to those who otherwise could not receive it. But *confining the license to "unserved households,"* a step separately effected by § 119(a)(2)(B), both patently limits speech and fails to protect copyrights. The same distant programming is already statutorily licensed for retransmission in other markets, and § 119(a)(2)(B) simply serves to reduce the royalty payments to copyright owners protected by the statute. The goal of compensating holders of copyrights is addressed the same way in § 119 as in § 111, the cable operators' license provision: royalty payments in proportion to the number of viewers receiving the licensed broadcasts. Under the SHVIA, the much larger group of households receiving *local* network programming under § 122 generates *no* royalty for copyright holders. The current licensing scheme thus provides a narrow license for distant broadcast retransmissions, which generates royalties for copyright holders, and a much broader license for local transmissions, which does not.

None of this explains the *"unserved household" restriction* in § 119(a)(2)(B), which simply and directly *prevents* many subscribers from receiving distant network programming. There is no record to demonstrate that the restriction is aimed at serving any government interest

beyond satisfying the impermissible paternalistic preference for "local" broadcast speech – an interest manifestly *not* unrelated to suppression of free expression. There is certainly no record to show that the challenged restriction was occasioned by any genuine harm or threat,[14] or that the restriction would actually reduce any real threat, or that the resulting deprivation is no greater than necessary.

Indeed, nothing in the Eleventh Circuit opinion or the record here suggests that the "unserved household" restriction actually serves even its stated purposes "in a direct and material way," as *O'Brien* requires. *Turner I*, 512 U.S. at 664. The structure and language of the current statutory scheme reveal that in fact the opposite is true. Under the SHVIA, for example, many "unserved households" now obtain local network programming via satellite through the § 122 license, but also remain eligible to receive distant network programming under § 119(a)(2)(B). Thus, contrary to the Eleventh Circuit's stated premise, the § 119(a)(2) license no longer serves only households that cannot otherwise receive local network programming. *See* Pet. App. 35a. Among households that can receive local broadcast retransmissions under § 122, the statute arbitrarily distinguishes between "unserved households," which are permitted to receive distant in addition to local programming, and "served" households, which are not.

In reality, then, the statutory scheme neither limits distant programming to viewers otherwise lacking access to network television, nor assures protection for copyright holders with respect to all or even most satellite

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[14] The legislative history, in fact, suggests the absence of a real harm. The Senate Commerce Committee repeatedly observed that the local network affiliates appearing before it had "failed to present convincing evidence to show that the current degree of distant carriage poses any realistic threat to the maintenance of a healthy, local over-the-air broadcasting system." S. Rep. No. 106-51, at 7 (1999). *Accord*, *id.* at 8.

retransmissions. In this context, the "unserved household" restriction suffers from precisely the same fundamental irrationality that defeated the federal ban on alcohol-content labeling in *Rubin*, 514 U.S. 476 (1995). In *Rubin*, this Court found that the challenged statute could not "directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme." 514 U.S. at 488. "There is little chance that § 205(e)(2) can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects." *Id.* at 489 (Thomas, J., writing for eight members of the Court). Following the same reasoning, this Court in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), found that a section of the Federal Communications Act, in the context of the whole regulatory scheme, was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.* at 190. The Court further criticized the regulation because it "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Id.* at 195.[15] Here, as in *Rubin* and *Greater New Orleans Broadcasting*, the patent mis-matches on the face of the current licensing scheme demonstrate that § 119(a)(2)(B) does not further an important or substantial government interest and fails to meet the very first *O'Brien* test.[16]

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[15] *See also 44 Liquormart*, 517 U.S. at 507 (invalidating restriction on commercial speech, where "the State's own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous"); *Cincinnati v. Discovery Network*, 507 U.S. 410, 427 (1993) (even a restriction on commercial speech failed where "the regulation 'provided only the most limited incremental support for the interest asserted'.") (quoting *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60, 73 (1983)).

[16] Indeed, "the patent overinclusiveness and underinclusiveness" of § 119(a)(2)(B) in relation to its asserted

This same incongruity precludes any finding that the statute is "narrowly tailored" to serve its purportedly content-neutral purpose, as *O'Brien* requires. The "fit" requirement is not satisfied unless the challenged provision "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner I*, 512 U.S. at 662 (quoting *Ward v. Rock against Racism*, 491 U.S. 781, 799 (1989)). Since § 119(a)(2)(B) does not effectively serve a legitimate government interest at all, any burden it imposes on protected speech is necessarily greater than the Constitution allows.[17] Moreover, a regulatory system similar to that governing cable retransmissions, which provides exclusivity within a 35-mile radius for local network programming, but allows non-identical distant network programming, is an obvious, less speech-intrusive alternative. The blunderbuss "unserved household" restriction thus plainly fails the narrow tailoring requirement.[18]

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purpose "suggests that the Government's purpose is not substantial." *FCC v. League of Women Voters*, 468 U.S. 364, 386, 385 n.16 (1984).

[17] The majority opinion in *League of Women Voters* reflects this logic, holding that "the manifest imprecision of the ban imposed . . . reveals that its proscription is not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech." 468 U.S. at 392.

[18] *See Lorillard*, 533 U.S. 525, 121 S. Ct. at 2426 (State failed to consider less burdensome alternatives, such as tailoring the restrictions to "advertising and promotion practices that appeal to youth, . . . while permitting others"); *id.* at 2438 (Thomas, J., opinion concurring in part and concurring in the judgment) (regulations "fail the narrow tailoring inquiry" because "the State should have examined ways of advancing its interest that do not require limiting speech at all"); *44 Liquormart*, 517 U.S. at 507 (plurality opinion) (ban not tailored because of "alternative forms of regulation that would not involve any restriction on speech"); *id.* at 528-29 (O'Connor, J., concurring) (noting "availability of less burdensome alternatives"); *Discovery*

Finally, the restriction violates the requirement that its purpose be "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377; *see also Turner I*, 512 U.S. at 622; *Turner II*, 520 U.S. at 189. For, as we have seen, the restriction at issue here is directly related to the suppression of distant network programming. That is its specific purpose. Because satellite signals are carried nationwide, EchoStar must block distant signals from many subscribers who could otherwise receive them. No law that so patently effects a "net decrease in the amount of available speech" can be viewed as unrelated to the suppression of free expression. *Cf. Turner I*, 512 U.S. at 647.

The Eleventh Circuit disregarded these established principles in upholding § 119(a)(2)(B) under intermediate scrutiny. In so doing, it created a new constitutional test that conflicts with the decisions of this Court and with decisions of other circuits.

III. Review Is Warranted To Establish That § 119(a)(2)(B) Is Not Immune From First Amendment Scrutiny Even Though It Is Structured As An Exception To A Statutory Copyright License.

The Eleventh Circuit held that § 119 "does not threaten . . . free speech rights but actually permits more speech than EchoStar would constitutionally be entitled to under the Copyright Act." Pet. App. 34a. The court of appeals purported to apply *Harper & Row*, 471 U.S. 539 (1985). According to the Eleventh Circuit, *Harper & Row* "rejected the suggestion that the First Amendment requires broader exceptions to the copyright laws than those explicitly conferred by Congress." Pet. App. 33a.

Network, 507 U.S. at 416-17 (considering less burdensome alternatives); *see also U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1238-39 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000) ("the FCC's failure to adequately consider an obvious and substantially less restrictive alternative . . . indicates that it did not narrowly tailor the . . . regulations" restricting speech).

To be sure, by definition *any* statutory copyright license permits the licensee "more speech" or more listeners than the Copyright Act would otherwise allow. That is a tautology. But whether the *limits* Congress has placed on such a license are constitutional is another question entirely. That the copyright law as a whole may be a universal, content-neutral statute ignores the issue here: whether the content-based, speaker-specific nature of the "unserved household" limitation on speech contained in § 119(a)(2)(B) is unconstitutional. This Court should grant review to confirm that *Harper & Row* did not, as the Eleventh Circuit erroneously believed, create a categorical First Amendment exception for laws enacted under the Copyright Clause of the Constitution.[19]

This case plainly raises a question akin to the second of the two questions on which this Court granted certiorari in *Eldred* – namely, whether the Copyright Term Extension Act of 1998 is "categorically immune from challenges under the First Amendment." While *Eldred* involves the question of *temporal* extensions of copyright protection, this case involves *geographical* extensions of copyright to prohibit satellite carriers from providing "distant" broadcast speech to "served" households.

A copyright exception to the First Amendment would be particularly anomalous because Congress, through the allocation of copyright prerogatives, "distributes speech entitlements that enable certain speakers to maintain their

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[19] *Harper & Row* held that the fair use exception to copyright was broad enough to protect the First Amendment right of the defendant to report news about a public figure. 471 U.S. at 560. It did not adopt or approve a general rule that the fair use exception provides all the First Amendment protection the Constitution requires. To the contrary, it *declined* to adopt a sweeping rule that any use of copyrighted material should be viewed as "fair use" if it concerns a public figure. *Id.* Far from creating a copyright exception to the First Amendment, the Court simply declined to "create what amounts to a public figure exception to copyright." *Id.*

market position and restrain competition." Netanel, 54 Stan. L. Rev. at 62. Use of the copyright laws for "the management and allocation of . . . communicative channels ha[s] far-reaching effects [on] the shape of public discourse." *Id.* at 64. From the perspective of listeners, audiences, and the marketplace of ideas, the copyright laws have the potential to limit speech by preventing retransmission of communication. For this reason, members of this Court have taken the view that courts should "hesitate to extend or strengthen" copyright protections. *See* Stephen G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 284 (1970). At a minimum, each legislative decision to make governmental machinery available to enforce copyrights must be seen as a form of state action to be tested against applicable constitutional standards.

The First Amendment and the Copyright Clause serve congruent purposes not because of a categorical copyright exception to the First Amendment but because "copyright is intended to increase and not to impede the harvest of knowledge." *Harper & Row*, 471 U.S. at 545. As the congressional proponents of the SHVA in 1988 acknowledged, "the primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors." H.R. Rep. No. 100-887, pt. I, at 10. Indeed, "[t]he Framers intended copyright itself to be the engine of free expression." *Harper & Row*, 471 U.S. at 558. Rather than restricting speech, "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Id.* at 546. In the case of satellite retransmissions, that "fair return" is provided by royalty payments incorporated in the license of 17 U.S.C. § 119.

The aims of copyright law parallel those of the First Amendment, which this Court has described as "assuring that the public has access to a multiplicity of information sources" and ensuring " 'the widest possible dissemination of information from diverse and antagonistic

sources.' " *Turner I*, 512 U.S. at 663 (citation omitted); *see also Turner II*, 520 U.S. at 190, 192 and 226-27 (Breyer, J., concurring in part). As the *Turner* decisions indicate, the freedoms to select, transmit, and receive speech under First Amendment protection are just as vital to this country's communication marketplace as is nurturing new creation by a grant of copyright royalties. Copyright law protects "expression, not ideas"; the First Amendment protects both.[20] Thus, the First Amendment is necessarily implicated when Congress enacts a copyright law restricting mass communication, even though the law may be described as an economic regulation. In *Turner I*, eight members of this Court acknowledged that a statute aimed at purely economic concerns still merits close First Amendment examination if it expressly governs the communications media:

> [L]aws that single out the press, or certain elements thereof, for special treatment "pose a particular danger of abuse by the state," and so are always subject to at least some degree of heightened First Amendment scrutiny.

512 U.S. at 640-41 (internal citation omitted).

Nor can such First Amendment concerns be swept aside simply because a copyright license may be characterized as a benefit. Even if Congress was not required to extend the statutory license in § 119(a)(2)(A), having chosen to do so, it may not shield the separate "unserved household" restriction of § 119(a)(2)(B) from First Amendment scrutiny. Under settled principles respecting "unconstitutional conditions," the government may not condition a benefit on a requirement that "the beneficiary surrender

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[20] First Amendment scrutiny was applied without question, for example, to a suit challenging the U.S. Olympic Committee's statutory power to control use of the word "Olympic," even though the Court found that the restriction did not prevent the challenger from conveying the substance of its message. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 538-39 (1987).

a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989). This Court has repeatedly held that the government must obey the Constitution when it grants – and limits – benefits, just as when it regulates conduct.[21] *Perry v. Sindermann*, 408 U.S. 593 (1972), left no doubt in the matter:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons on which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.

Id. at 597. In the ensuing thirty years, the principle articulated in *Perry v. Sindermann* has become well-established.[22]

The Eleventh Circuit's contrary approach – effectively exempting § 119(a)(2)(B) from First Amendment scrutiny because it is codified as part of the copyright laws – is

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[21] This case does not implicate any form of government subsidy, either for government speech as in *Rust v. Sullivan*, 500 U.S. 173 (1991), or for private speech as in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). No government funds are provided to satellite carriers here. Instead, the § 119 license represents the transfer of a portion of the copyright interest originally granted by the government from one group of speakers to another, in exchange for a license fee.

[22] *See, e.g.*, *44 Liquormart*, 517 U.S. at 513 (state power to license liquor sellers does not justify banning liquor advertising as a condition of license); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995) (universities that decide to fund student publications may not deny funds to religious publications); *League of Women Voters*, 468 U.S. at 398-99 (federal government may not condition public broadcast funding on station's abstaining from political editorials).

contrary to the decisions of this Court and sets a precedent that will provide a blueprint for the evisceration of the First Amendment in the name of copyright.

CONCLUSION

The petition for writ of certiorari should be granted. At minimum, it should be held in abeyance pending the disposition of *Eldred v. Ashcroft*.

Respectfully submitted,

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March 27, 2002

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-15378

D. C. Docket Nos. 98-02651-CV-LCN
99-06382-CV-LCN

CBS BROADCASTING, INC.,
FOX BROADCASTING COMPANY,
ABC, INC., NATIONAL
BROADCASTING CO., FBC
TELEVISION AFFILIATES
ASSOCIATION, et al.,

Plaintiffs-Appellees,

versus

ECHOSTAR COMMUNICATION
CORPORATION, d.b.a. DISH
Network, ECHOSTAR SATELLITE
CORPORATION, SATELLITE
COMMUNICATIONS OPERATING
CORPORATION, DIRECT SAT CORP.,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Intervenor.

ECHOSTAR COMMUNICATION
CORPORATION, a Nevada
Corporation,

Plaintiff-Counter-
Defendant-Appellant,

ECHOSTAR SATELLITE CORPORATION, a Colorado corporation, SATELLITE COMMUNICATIONS OPERATING CORPORATION, a Colorado corporation DIRECT SAT CORPORATION, a Delaware corporation,

Plaintiffs-Appellants,

versus

CBS BROADCASTING INC., a New York corporation, FOX BROADCASTING, CO., a California corporation, NATIONAL BROADCASTING CO., a New York corporation, ABC, INC., a New York corporation,

Defendants-Counter-Claimants-Appellees,

UNITED STATES OF AMERICA,

Intervenor.

Appeal from the United States District Court for the Southern District of Florida

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(Filed September 17, 2001)

Before ANDERSON, Chief Judge, BIRCH and WOOD*, Circuit Judges.

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ANDERSON, Chief Judge:

This is an interlocutory appeal from the entry of a preliminary injunction in a copyright infringement suit that was initiated by four major television network stations and associations representing hundreds of local network affiliates against EchoStar Satellite Company and its subsidiaries. The propriety of the preliminary injunction depends in large part upon the Satellite Home Viewer Act ("SHVA"), 17 U.S.C. § 119, and its most recent amendments in the Satellite Home Viewer Improvement Act of 1999 ("Improvement Act" or "the Act"), Pub. L. No. 106-133, § 1001, *et seq.*, 113 Stat. 1537, 515 (West Supp. 2001). SHVA, as amended by the Improvement Act, creates a compulsory, statutory license for satellite carriers to transmit copyrighted network programming for private home viewing to "persons resid[ing] in unserved households." 17 U.S.C. § 119 (1996 & West Supp. 2001). The district court found, *inter alia*, that there was a substantial likelihood that the Networks could establish that EchoStar provides distant network signals to "served" residences thereby falling outside of the Act and violating the Networks' copyrights. Because we conclude that this finding was an abuse of discretion, we vacate the preliminary injunction and remand for further proceedings consistent with this opinion.

BACKGROUND

A. Factual Background

CBS Broadcasting, Inc. ("CBS"), Fox Broadcasting Company ("Fox"), ABC, Inc., National Broadcasting Co.,

CBS Television Network Affiliates Association, FBC Television Affiliates Association, ABC Television Affiliates Association, and NBC Television Affiliates are the respective owners of the CBS, Fox, ABC, and NBC television networks, and are the trade associations representing hundreds of CBS, Fox, ABC, and NBC affiliate stations. The Networks own the copyright or exclusive rights in numerous television programs broadcast by CBS, Fox, ABC, and NBC network stations. EchoStar Communications Corporation and its subsidiaries, EchoStar Satellite Corporation, Satellite Communications Operating Corporation, and Direct Sat Corporation (collectively "EchoStar"), provide satellite television programming to over five million Americans under the name "DISH Network."

During the 1990's, EchoStar began providing satellite television programming to subscribers with small (18 inch) satellite dishes. To provide such programming, EchoStar contracted with PrimeTime 24 Joint Ventures ("PrimeTime") to obtain distant network signals.[1]

In December 1996, in the district court for the Southern District of Florida, CBS, Fox, and various CBS affiliates sued PrimeTime, asserting that PrimeTime was infringing on the networks' copyrights by transmitting network material to individuals who did not qualify as

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[1] The phrase "distant network programming" or "distant network signals" refers to network programming that is not from a subscriber's local market. For example, distant network signals would be utilized, and distant network programming would be provided, when a satellite provider transmits NBC programming from a Chicago affiliate to subscribers in another television market such as Macon, Georgia.

"unserved" (herein "PrimeTime litigation"). *See CBS, Inc., v. PrimeTime 24 Joint Venture*, 245 F.3d 1217 (11th Cir. 2001). By orders dated May 13, 1998, and July 19, 1998, the district court preliminarily and permanently enjoined PrimeTime from "deliver[ing] CBS or Fox television network programming to any customer that does not live in an 'unserved household' as defined in" SHVA. *See CBS, Inc. v. PrimeTime 24 Joint Ventures*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (preliminary injunction) (*CBS I*); *CBS Broadcasting v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction) (*CBS II*).[2]

On July 20, 1998, the day after the permanent injunction in the PrimeTime litigation was entered, EchoStar announced publicly that it would be providing its own package of distant network programming. EchoStar created two such packages to include signals from ABC, CBS, Fox, and NBC affiliates in New York City and Los Angeles.

At that time, EchoStar also implemented its own screening process for new customers to ensure SHVA compliance.[3] First, EchoStar hired an independent engineering firm to provide a nationwide "red light/green

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[2] After the permanent injunction was entered, PrimeTime moved the district court to modify the order to account for the C-band grandfathering provision promulgated with the passage of the Improvement Act. *See* 17 U.S.C. § 119(a)(2)(B)(iii) (West Supp. 2001). The district court granted PrimeTime's motion by interpreting the C-band provision, and PrimeTime appealed. We addressed the propriety of the court's interpretation of § 119(a)(2)(B)(iii) in *CBS, Inc.*, 245 F.3d 1217.

[3] Much of the PrimeTime litigation centered around PrimeTime's efforts to ensure SHVA compliance. PrimeTime's practice had been to rely on subscriber's subjective

light" database that uses the Longley-Rice predictive model to predict Grade A and Grade B signal intensity within specific zip codes. In screening prospective subscribers, EchoStar scanned their zip-code to determine whether the subscriber resided in a red or green light area, *i.e.*, whether the residence was predicted to receive a Grade A or B intensity. If predicted to reside in a Grade A or B contour, the subscriber was allegedly refused distant network services unless that subscriber obtained a waiver from the local network affiliate or a professionally administered signal intensity test indicating that the residence does not receive a Grade A or B signal from the network affiliates in that market.

Beginning sometime after February 1999, EchoStar hired Dataworld, a second independent engineering firm, to construct a Grade A/Grade B database using the Individual Location Longley-Rice propagation model ("ILLR model"). This database was provided to EchoStar sometime in 1999, and upon receipt of the software, EchoStar alleges that it has run all prospective subscribers through the ILLR model in the same manner that it utilized the red light/green light database. Finally, in 1999, EchoStar began negotiations with Decisionmark Corporation, a

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representations regarding the qualify of their television picture. Various courts found this subjective inquiry to be insufficient under SHVA, which utilizes an objective standard for judging a subscriber's signal intensity. *See* 17 U.S.C. § 119(d)(10)(A) (setting Grade B intensity as the standard); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (holding PrimeTime's subjective inquiry to be unlawful); *CBS II*, 48 F. Supp. 2d 1342 (same); *CBS I*, 9 F. Supp. 2d 1333 (same).

third independent engineering firm, to provide ILLR testing for all of EchoStar's pre-July 1998, PrimeTime-derived subscribers to confirm their eligibility under SHVA.

B. Procedural Background

On October 19, 1998, EchoStar filed a declaratory judgment action against the Networks in the United States District Court for the Southern District of Colorado, Case No. 98-CIV-02285, seeking a declaration that it was complying with SHVA. The Networks did not respond initially in the Colorado litigation.

Instead, on November 5, 1998, the Networks filed a complaint in the United States District Court for the Southern District of Florida alleging that EchoStar was infringing on the Networks' copyrights by providing distant network programming to "served" households. A few days later, on November 9, 1998, the Networks filed a motion in the Colorado district court to transfer EchoStar's declaratory judgment action to the Southern District of Florida. The Colorado district court granted the Networks' motion to transfer on March 29, 1999, and on April 28, 2000, the Colorado litigation was consolidated with the Networks' copyright infringement suit in the Southern District of Florida.

Meanwhile, on December 2, 1998, the Networks filed a motion for a preliminary injunction in the Southern District of Florida seeking to enjoin EchoStar from infringing on its copyrights. By written motion, EchoStar requested an evidentiary hearing and requested the court to compel the Networks to comply with its discovery requests. The district court did not respond to these

motions, but set oral argument on the Networks' preliminary injunction motion for September 21, 1999.

Oral argument was held on September 21, 1999, and on September 29, 2000, the district court granted the Networks' motion for a preliminary injunction against EchoStar. In the order granting the preliminary injunction, the court denied EchoStar's requests for an evidentiary hearing and motions to compel.

Finding all four prerequisites for a preliminary injunction satisfied, the district court enjoined EchoStar from transmitting distant network programming to "served households" within the meaning of SHVA. Specifically, the court first found that there was a substantial likelihood that the Networks' copyright infringement suit would succeed because the evidence demonstrated that EchoStar "likely provides distant network transmissions to numerous households which are not 'unserved' " and EchoStar's violations of SHVA are willful and repeated. Second, the court found that "[b]ecause the network parties have established that they are likely to prevail on the merits, they are entitled to a presumption of irreparable injury." Third, the court weighed the equities, finding that the potential injuries to the Networks should the injunction not issue outweighed any injury to EchoStar that could occur from issuance. Lastly, the court reasoned that the preliminary injunction would not disserve the public interest because the public interest lies with protecting the rights of copyright owners. Finding the four prerequisites satisfied, the court granted the Networks' motion, directing EchoStar to terminate distant network programming to "served households."

In addition to entering the preliminary injunction, the court interpreted 17 U.S.C. § 119(e). The parties disputed whether this provision enables a subscriber to transfer to a different satellite provider with his or her grandfathered rights under § 119(e). The court found that § 119(e) was ambiguous and resorted to legislative history to interpret it. Based on the Conference Committee Report accompanying the Improvement Act, the district court concluded that "grandfathered status is not transferable to a different [satellite] carrier . . . "

EchoStar timely filed an interlocutory appeal from the court's order. On November 22, 2000, this Court, upon motion of EchoStar, stayed the preliminary injunction pending appeal and, *sua sponte*, we expedited consideration of this case. On appeal, we have granted three motions to file amicus curiae briefs.[4] Pursuant to 28 U.S.C. § 2403(a), we also granted the Department of Justice's motion to intervene as a matter of right to defend the constitutionality of the Act.

A. SHVA & The Improvement Act

The Satellite Home Viewers Act ("SHVA") was enacted in November 1988, *see* Pub. L. 101-667, Title II, § 202(2), 102 Stat. 3949, and was amended by Congress in 1993, 1994, 1995, and 1997. SHVA creates a compulsory,

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[4] Specifically, we granted the National Association of Broadcasters and the Satellite Broadcasting and Communication Association leave to file amicus curiae briefs, as well as the joint motion of the Consumer Federation of America and Media Access to file a joint amicus curiae brief.

statutory license for satellite carriers to retransmit copyrighted network programming for private home viewing to "persons resid[ing] in unserved households" without the consent of the copyright owner. 17 U.S.C. § 119(a)(2)[5] (1996). The satellite carrier's license is limited to "unserved households," which SHVA describes as a residence that:

> (A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and

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[5] As to network stations, SHVA provides:

> **(A) In general.** – Subject to the provisions of subparagraphs (B) and (C) of this paragraph and paragraphs (3), (4), (5), and (6) of this subsection, secondary transmissions of programming contained in a primary transmission made by a network station and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for such retransmission service to each subscriber receiving the secondary transmission.
>
> **(B) Secondary transmissions to unserved households.** – The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions to persons who reside in unserved households.

17 U.S.C. §§ 119(a)(2)(A) and (B).

> (B) has not, within 90 days, before the date on which that household subscribes, . . . subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

Id. at (d)(1) (1996). For SHVA's statutory license to extend to a satellite subscriber, the residence must satisfy the objective requirements for "unserved household." *See PrimeTime 24 Joint Ventures v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 96 (2d Cir. 2000) ("the SHVA establishes a relatively objective signal-strength rule rather than a subjective rule of reception quality"); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348, 353 (4th Cir. 1999) ("The very terms of the SHVA define eligible households by means of an objective, measurable standard."); *CBS II*, 48 F. Supp. 2d at 1355.

SHVA's statutory license was set to expire in 1999 and throughout the year Congress considered an extension of, and changes to, the statutory license. "After both houses of Congress passed differing bills amending SHVA, a conference committee negotiated what became the [Satellite Home Viewers Improvement Act of 1999]." *PrimeTime 24*, 245 F.3d at 1220. The Improvement Act was ultimately passed by Congress and signed into law by President Clinton on November 29, 1999. *See* Pub. L. No. 106-113, § 1001, *et seq.*, 113 Stat. 1536, 515 (1999).

The Improvement Act renews SHVA's existing statutory copyright license and, among other things, the Act further defines the scope of the license for retransmission of network programming. *See, e.g.*, 17 U.S.C. § 119(a)(2)(A)-(C) (West. Supp. 2001). Significantly,

Congress altered the definition of an "unserved household" by amending § 119(d)(10) to read:

> The term "unserved household," with respect to a particular television network, means a household that –
>
> (A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the F[CC] . . . under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999;
>
> (B) is subject to a waiver granted under regulations established under section 339(c)(2) of the Communications Act of 1934 [47 U.S.C.A. § 339(c)(2)];
>
> (C) is a subscriber to whom subsection (e) applies;
>
> (D) is a subscriber to whom subsection (a)(11) applies; or
>
> (E) is a subscriber to whom the exemption under subsection (a)(2)(B)(iii) applies.

Id. at § 119(d)(10). With the Improvement Act, eligibility as an "unserved household" is now three-fold. A private residence qualifies as "unserved" if it: 1) is predicted to receive less than a Grade B signal intensity, 2) receives a waiver from the local television network station to

receive distant network programming, or 3) is grandfathered or otherwise exempted by the express terms of the statute[6]. *See id.*

The Improvement Act not only redefines "unserved households" but it further refines the methodology used to determine the signal intensity at a specific location. Specifically, Congress added § 119(a)(2)(B)(ii)(I), which explains that:

> In determining presumptively whether a person resides in an unserved household under subsection (d)(10)(A), a court shall rely on the Individual Location Longley-Rice model set forth by the Federal Communications Commission in Docket No. 98-201, as that model may be amended by the Commission over time under section 339(c)(3) of the Communications Act of 1934 [47 U.S.C.A. § 339(c)(3)] to increase the accuracy of that model.

17 U.S.C. § 119(a)(2)(B)(ii)(I) (West Supp. 2001). This provision allows a satellite provider to establish presumptively that a subscriber qualifies as "unserved" where the ILLR model, as set forth by the Federal Communications Commission[7] ("FCC"), establishes that the residence cannot receive an over-the-air signal of a primary network

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[6] For example, § 119(a)(11) extends the license to certain recreational vehicles, while § 119 (a)(2)(B)(iii) grandfathers certain C-band subscribers, and § 119(e) grandfathers certain subscribers whose services were terminated or received during a specific period.

[7] When passing the Improvement Act in 1999, Congress also promulgated 47 U.S.C. § 339(c)(3), which requires the FCC to "take all actions necessary, including any reconsideration, to develop and prescribe by rule a point-to-point predictive model

station of Grade B intensity. *See id.* Under the Improvement Act, if the ILLR model predicts that a household cannot receive a signal of Grade B intensity or better, the home is "unserved" under § 119(a)(10)(A), and the Act's narrow statutory license extends to that residence.

DISCUSSION

EchoStar argues that the district court erred in entering a preliminary injunction that does not satisfy the four prerequisites and is overly broad. Further, it contends that the Improvement Act and SHVA violate the First Amendment, and that the district court erred in interpreting § 119(e). We address each argument in turn.

A. Standard of Review

We review the district court's findings of fact under a clearly erroneous standard, and its conclusions of law *de novo*. *See SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996). The district court's preliminary injunction will be reversed only upon a showing of abuse of discretion. *See Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (en banc) (citing cases). This means that "we must affirm unless we at least determine that the district court has made a 'clear error of judgment,' or has applied an incorrect legal standard.' " *SunAmerica*, 77 F.3d at 1333.

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for reliably and presumptively determining the ability of individual locations to receive signals in accordance with the signal intensity standard in effect under section 119(d)(10)(A)." 47 U.S.C. § 339(c)(3) (West Supp. 2001).

A district court may grant a preliminary injunction only upon the movant's showing that: (1) it has a substantial likelihood of success on the merits; (2) the movant will suffer irreparable injury unless the injunction is issued; (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party; and (4) if issued, the injunction would not disserve the public interest. *Siegel*, 234 F.3d at 1176. It is well-established in this Circuit that "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' " as to all four elements. *Id.* (citing cases).

B. Substantial Likelihood of Success

To satisfy this prong, the Networks bore the burden of demonstrating a substantial likelihood of success on its copyright infringement claims. *See, e.g., Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1026 (11th Cir. 1989) (a "preliminary injunction require[s] that [the movant] demonstrate a substantial likelihood of success on the merits of its infringement claim").

Owners of copyrights in television programs enjoy the exclusive right to "publicly perform" those programs and to license others to do so. *See* 17 U.S.C. § 106(4) (1996). There is no dispute that the Networks own the exclusive copyrights in the numerous network television programs that EchoStar retransmits to certain subscribers. There is likewise no dispute that EchoStar is a satellite television carrier under SHVA, *see* 17 U.S.C. § 119(d)(6), and is entitled to the compulsory, statutory

copyright license to retransmit distant network programming to viewers without the Network's permission if the satellite subscriber qualifies as an "unserved household," *see id.* at §§ 119(a)(2)(A), (a)(2)(B)(ii), & (d)(10). Here, the controversy centers around whether EchoStar's distant network subscribers are actually "unserved."

Accepting EchoStar's proffer of evidence, the district court found that the "record evidence demonstrate[d] that EchoStar transmits distant network signals to a significant number of households which are not unserved." Based on this finding, the court held that the Networks established a substantial likelihood of success on their petition for relief under the Copyright Act.

1. Burden of Proof & Statutory Presumption to Determine "Unserved Household"

First, EchoStar argues that the Networks failed to satisfy its burden of demonstrating that there is a substantial likelihood that it can establish EchoStar's violations of SHVA and the Improvement Act. The Networks counter that under 17 U.S.C. § 119(a)(5)(D) EchoStar has the burden of demonstrating that its distant network subscribers are "unserved."

Resolving this, the district court reasoned that "[a]lthough the network parties bear the burden of proof on their motion for preliminary injunction, 'the court must consider that the ultimate burden of proof at trial is upon the nonmovant.' " Thus, the court concluded that the Networks could " 'establish likelihood of success on the merits by demonstrating that [EchoStar] is unlikely to

prove at trial that its subscribers are 'unserved households.' "

In the 1994, Congress added § 119(a)(5)(D) to SHVA, providing that:

> In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is for private home viewing to an unserved household.

17 U.S.C. § 119(a)(5)(D) (1996). This provision places the ultimate burden of demonstrating SHVA eligibility on the satellite carrier. While the satellite carrier is harnessed with the ultimate burden at trial, it is well-settled that in a preliminary injunction posture the movant must always bear the burden of demonstrating the four prerequisites. *See e.g., Siegel,* 234 F.3d at 1176. In resolving how to allocate these burdens, the mechanics of the Improvement Act are illustrative.

The Improvement Act allows parties to establish "presumptively whether a person resides in an unserved household . . . ," through the ILLR predictive model, as it may be amended by the FCC. 17 U.S.C. § 119(a)(2)(B)(ii)(I) (West Supp. 2001). In establishing the presumption, the provision specifically directs that "courts shall rely on the I[LLR] . . . model" as the FCC may revise it. *See id.* As a corollary to this, the Improvement Act amends SHVA's reporting requirements by requiring that:

> satellite carrier[s] that make[ ] secondary transmissions of a primary transmission . . . by a network station pursuant to subparagraph (A) shall, 90 days after commencing such secondary

> transmissions, submit to the network that owns or is affiliated with the network station a list identifying (by name and street address, including county and zip code) all subscribers to which the satellite carrier makes secondary transmission of that primary transmission.

17 U.S.C. § 119(a)(2)(C) (West Supp. 2001).[8]

Utilizing the Improvement Act's paradigm in a preliminary injunction posture, the district court should on remand require the Networks to adduce sufficient evidence to apply the § 119(a)(2)(B)(ii)(I) presumption based on the records submitted to it by EchoStar under § 119(a)(2)(C)'s reporting requirements. While SHVA and the Improvement Act place the ultimate burden of proof at trial on the satellite carrier, *see* 17 U.S.C. § 119(a)(5)(D),

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[8] Section 119(a)(2)(C) further explains the reporting requirements as follows:

> Thereafter, on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by name and street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last submission under this subparagraph. Such subscriber information submitted by a satellite carrier may be used only for purposes of monitoring compliance by the satellite carrier with this subsection. The submission requirements of this subparagraph shall apply to a satellite carrier only if the network to whom the submissions are to be made places on file with the Register of Copyrights a document identifying the name and address of the person to whom such submissions are to be made. The Register shall maintain for public inspection a file of all such documents.

the fixed principle in the preliminary injunction context is that the proponent of a [sic] such an injunction must always make the prima facie showing of substantial likelihood of success on the merits, *see Siegel*, 234 F.3d at 1176.

The principle guiding us is this: Where the ultimate burden of proof at trial is on the non-movant, the party seeking a preliminary injunction must nonetheless make some prima facie showing before the burden of production or proof shifts to the non-movant. *See generally Deerfield Med. Ctr. V. City of Deerfield Beach*, 661 F.2d 328, 336-38 (5th Cir. 1981)[9]. In litigation involving the Improvement Act, the movant may do this by applying the statutory presumption, and thereby demonstrating that a substantial number of the satellite carrier's subscribers presumptively fall outside of the narrow copyright license created by SHVA and the Improvement Act. *See* 17 U.S.C. § 119(a)(2)(B)(ii)(I). Pragmatically, this task should not be onerous because the satellite carrier is required under § 119(a)(2)(C) to submit its subscriber lists to the networks. *See id.* at (a)(2)(C). Based on such data, a network should be able to demonstrate which subscribers are presumptively served and unserved. Once presumptive noncompliance is established, the non-movant or satellite carrier may rebut the presumption with, for example, evidence of signal strength tests or waivers from local affiliates. Such a burden-shifting model ensures that the party opposing a preliminary injunction

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[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

is not saddled with the burden of production, initially, and that the proponent of this "extraordinary and drastic remedy" is required to "clearly establish the 'burden of persuasion' as to the four requisites," *Siegel*, 234 F.3d at 1176.

Here, the court examined the Network's proffer of Jules Cohen's declaration. The court concluded that it "w[ould] not rely on Mr. Cohen's maps or his Declaration testimony" because Cohen's maps "overstate the number of unserved households to which EchoStar transmits distant network programming" by relying on an outdated code provision. The Cohen evidence was the only evidence proffered by the Networks' to carry their initial burden.[10]

Having rejected the only evidence adduced by the Networks, the court turned to EchoStar's submission of Michael R. Hawkins's declaration and five supporting ILLR maps of Chicago, San Francisco, Washington, D.C., Dallas-Fort Worth, and Memphis. For purposes of the injunction, the court concluded it would "accept as accurate Mr. Hawkins's Declaration testimony and his analysis of the ILLR maps." Based thereon, the court found that "in five designated market areas, EchoStar likely provides distant network programming to thousands of households which are not 'unserved.' "[11] The court found

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[10] The Networks suggest that the district court did rely on Cohen's declaration. This contention is unpersuasive, however, in light of the district court's express statement that it "w[ould] not rely on Mr. Cohen's maps or his Declaration testimony."

[11] Specifically, the district court found Hawkins's maps to indicate that: 1) 39.33% of EchoStar's Chicago area subscribers,

that Hawkins' declaration established that "at least 9,956 people in five markets – *i.e.*, 25.27% of EchoStar's 39,397 subscribers in those markets – receive a signal of Grade B intensity or higher, and presumptively do not reside in unserved households." Based on Hawkins's declaration, the court found it presumptively established that at least 25.27% of EchoStar's customers were "served," and that there was a substantial likelihood that the Networks could demonstrate that EchoStar was presumptively violating the Act.

The district court's approach was not much different than the burden-shifting model suggested above. The flaw we find, however, in the district court's analysis is its finding that the predicate burden is satisfied by evidence pertaining only to five markets that were tested by Hawkins. We conclude that the district court's extrapolation from these five markets to draw conclusions about satellite subscribers in two-hundred and thirty nationwide markets is not supported by the record.[12] There is

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or rather, 2,171 households receive a signal of Grade B intensity or stronger; 2) 44.48% of EchoStar's San Francisco area subscribers, or rather, 4,451 households receive a signal of Grade B strength or stronger; 3) 3.07% of EchoStar's Washington, D.C. area subscribers, or rather, 321 households receive a signal of Grade B strength or stronger; 4) 32.72% of EchoStar's Dallas-Fort Worth area subscribers, or rather, 2, 659 households receive a signal of Grade B strength or stronger; and 5) 7.01% of EchoStar's Memphis area subscribers, or rather, 354 households receive a signal of Grade B strength or stronger.

[12] We pause to note that the Networks possess the tools to produce the evidence we require. As explained above, the statutory presumption is available to the Networks, which enables them to tag a presumptive label on EchoStar's

no evidence in the instant record that the five markets are representative of Echostar's nationwide service, nor do the Networks point to other evidence that the district court's extrapolation is reasonable.[13]

2. Willful or Repeated Infringement

Networks may sue satellite carriers under the Improvement Act where the satellite carrier's violations of the Act are "willful or repeated." *See* 17 U.S.C. §§ 119(a)(5)(A) & (B). Here, the district court found that there was a substantial likelihood that the Networks would be able to demonstrate willful and repeated violations because of: (1) EchoStar's belated submission of ILLR maps, (2) the twenty-percent rule, and (3) EchoStar's failure to demonstrate corrective action. EchoStar appeals all three conclusions, arguing that the Networks failed to demonstrate that its violations were willful or repeated.

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subscribers, as either served or unserved. Because Echostar is and has been required to submit its subscriber lists to the Networks, *see* 17 U.S.C. § 119(a)(2)(C), the Networks should have the information necessary to apply the statutory presumption. We assume the Networks have such data, lest they would have alleged an infringement based on noncompliance with the reporting requirements. *See* 17 U.S.C. § 119(a)(3) (making noncompliance with reporting and payment requirements actionable as an act of infringement).

[13] The Networks suggest that we should infer that the five markets are representative merely because Echostar offered the Hawkins evidence. However, the record does not support the assertion that Hawkins or Echostar asserted or conceded that the five markets were representative.

a. Delay in Submitting ILLR Maps

The district court found that Hawkins' declaration established willful and repeated violations of the Act. First, the court reasoned that, in May of 1998 in *CBS I*, the district court for the Southern District of Florida established the ILLR model as the proper litmus for determining presumptively whether a subscriber qualifies as "unserved." The court reasoned that the ILLR model was thereafter adopted by the FCC by written Report and Order in February 1999, and that Congress followed suit in July 1999 by promulgating the § 119(a)(2)(B)(ii)(I) presumption based on the ILLR model. Because EchoStar did not begin generating ILLR maps until approximately September of 1999, the court found that "[t]his delay demonstrates a willful desire to avoid compliance with the [Act]."

We find that the district court erred in inferring a willful desire to avoid compliance from the evidence in this record. On December 2, 1998, the Networks submitted Cohen's declaration with supporting Longley-Rice maps as support for its motion for a preliminary injunction. A little over a month later, on January 15, 1999, the Networks submitted the supplemental declaration of Cohen utilizing the Longley-Rice model. Weeks later, on February 1, 1999, the FCC issued a Report and Order in the matter of *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, CD Docket No. 98-201 (FCC February 1, 1999) ("February Order"), embracing the ILLR model for

determining signal intensity at individual locations.[14] Responding to the February 1999 Report, the Networks, on July 12, 1999, submitted Cohen's second amended affidavit with supporting ILLR maps. A little over two months later, on September 20, 1999, EchoStar submitted the declaration of Hawkins, with supporting ILLR maps.

We reverse the district court's finding of willful and repeated violations on this ground as an abuse of discretion because EchoStar's delay was not significant, as compared to the Networks' own actions, and there is no record evidence to support the court's inference. First, it took the Networks over five months to compile ILLR maps and models, and it took EchoStar only two months thereafter to submit its ILLR maps in rebuttal.[15] Second, Hawkins' affidavit attests to the fact that EchoStar attempted to employ the ILLR model, and that despite difficulties and delays in obtaining the computer software needed to utilize this technology, EchoStar began generating ILLR maps as soon as EchoStar could adapt the software to its subscriber base.[16] The only way that the

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[14] Adoption of this new testing method is, and was, central to this dispute because SHVA and the Improvement Act make Grade B intensity the benchmark for determining whether a household is "unserved." *See* 17 U.S.C. § 119(a)(2)(B)(ii)(I) (West Supp. 2001).

[15] The Networks did not complete and submit to the court its ILLR results until July 12, 1999, while the ILLR model was adopted on February 1, 1999.

[16] Specifically, in his affidavit submitted to the court on September 20, 1999, Hawkins explains that:

> EchoStar has experienced some delays in incorporating the ILLR model endorsed by the FCC,

court could have found a dilatory motive in the face of such statements is by finding Hawkins' statements to be untrue, and inferring from the circumstances, *i.e.*, the amount of time it took EchoStar took [sic] to submit ILLR maps, that EchoStar had a willful desire to avoid compliance with the Act. "[I]nference[s] based on speculation and conjecture [are] not reasonable." *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1518 (11th Cir. 1988). Here, the court inferred a willful desire to avoid compliance with the Act from Hawkins' comments and explanations for EchoStar's delay in utilizing workable ILLR maps. EchoStar's difficulty in employing the ILLR technology does not, on this record and without an evidentiary hearing, establish willful or repeated violations of the Act, and we reverse the district court's conclusion to the contrary.

b. Twenty-Percent Rule

Second, the court used the twenty-percent rule to find a substantial likelihood that the Networks could demonstrate willful and repeated violations. The twenty-

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> in part, because of the length of the cue at DataWorld. As a result, in part, of these delays, EchoStar only recently obtained from DataWorld its ILLR data, implementing the ILLR model endorsed by the FCC. . . . Once EchoStar received this ILLR data from DataWorld, EchoStar still had to geocode its subscribers (a substantial task) before using the data to determine whether EchoStar's subscribers are eligible to receive distant network programming via satellite.

Hawkins' Affidavit ¶ 8.

percent rule, derived from the 1988 legislative history of § 119(a)(5) provides that:

> In view of the possibilities for error which would occur despite reasonably diligent efforts to avoid them (because of variables such as consumer self-reporting and engineering tests of signal adequacy) it is the intent of this statute that no pattern or practice be found if, excluding subscribers grandfathered under section 119(a)(5)(C), less than 20% of the subscribers to a particular network station (on either local, regional, or national bases) are found ineligible.

H.R. Rep. No. 100-887(I), at 19 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 1511, 5622. The district court reasoned that a "substantial percentage (25.57%) of EchoStar's subscribers in the five markets who Mr. Hawkins's ILLR maps predict do not reside in unserved households, combined with the lack of evidence regarding waivers or field test results, supports a finding of a willful and repeated pattern or practice of infringement."

EchoStar argues that the Networks submitted no reliable evidence, let alone signal strength tests, to demonstrate that at least 20% of the contested subscribers are actually served. It argues that because the district court aggregated the five test markets in Hawkins' declaration, instead of considering each individual network station, the court misapplied the rule. The Networks counter that there is nothing wrong with aggregating the test markets from Hawkins' declaration because the twenty-percent rule refers to subscribers to a particular network station, not the station whose market is being invaded.

We need not resolve the above disputes regarding the interpretation and application of the twenty-percent rule.[17] Instead, we reverse the district court's finding of substantial likelihood of success in demonstrating willful or repeated violations because the court relied on extrapolations from only five test markets. As noted above, we can find no evidence in the record that the five markets tested by Hawkins are representative of EchoStar's five-million nationwide satellite subscribers in two-hundred and thirty different markets across the country. We refuse to engage in speculation and conjecture in reviewing this nationwide preliminary injunction. *See Chapman*, 861 F.3d at 1518. The court's finding that the Networks' had a substantial likelihood of success in demonstrating willful and repeated violations is erroneous because it is based on extrapolations from 5 out of 230 markets in the United States, and there are no findings that these five test markets are representative of EchoStar's nationwide subscriber base.

c. Corrective Action

The district court's third ground for finding willful and repeated violations for preliminary injunction purposes was the fact that EchoStar failed to demonstrate corrective action. Specifically, the court found that: (1) there was no evidence that EchoStar intended to take

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[17] Further, because no party raises the issue, we need not decide the propriety of applying such a standard from Committee Reports which predate the current version of § 119(a)(5).

corrective action in light of Hawkins' findings of presumptively illegal subscribers, and (2) there was no evidence that EchoStar turned off its pre-July 1998 subscribers signed-up in reliance on PrimeTime's subjective qualification process, which was held insufficient to comply with SHVA in *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999), *CBS II*, 48 F. Supp. 2d 1342, and *CBS I*, 9 F. Supp. 2d 1333.

As to the first finding, the court reasoned that Hawkins' declaration established that at least 9,956 of EchoStar's subscribers in the five test markets were presumptively illegal. The court reasoned that "Hawkins does not suggest that a substantial portion of those 9,956 presumptively illegal subscribers received waivers or had field testing performed at their households, but instead states only that 'certain subscribers' received waivers or were subjected to field testing." Finding that Hawkins did not "suggest that EchoStar plans to take corrective action with regard to those subscribers," the court inferred that EchoStar was "aware that significant numbers of its subscribers presumptively do not reside in unserved households, [and] has not acknowledged that fact and apparently has taken no corrective action," which "demonstrates a willful disregard of [SHVA]."

EchoStar argues that the foregoing conclusion is clearly erroneous because the Networks submitted no evidence that EchoStar did not intend to bring itself into compliance and the record actually establishes the opposite. We agree that the district court erred.

The district court's inference that EchoStar will not take corrective action is an abuse of discretion on this

record. First, the court rejected Hawkins' suggestion that some of the 9,956 presumptively illegal subscribers were eligible under the Act because the individuals received favorable signal strength tests or waivers from the local affiliates. Because EchoStar did not introduce evidence of waivers or signal tests in the preliminary injunction proceedings, the court inferred that no such proof of compliance existed and no such measures had been taken. Such an inference is inconsistent with Hawkins' declaration that "certain subscribers are included in the sorting even though *they have obtained* [waivers] or cannot, in fact, receive a Grade B signal . . . as confirmed by actual field testing." (emphasis supplied). As is evident, the court rejected Hawkins' assertion that certain subscribers "have obtained" signal tests or waivers, and concluded that EchoStar did not possess such evidence, without any record evidence indicating this statement was untrue or otherwise not credible. Without the benefit of an evidentiary hearing, the district court erred in rejecting Hawkins' assertions as not credible.[18] We conclude that

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[18] A district court need not hold an evidentiary hearing prior to the issuance of every preliminary injunction. *See All Care Nursing Service v. Bethesda Memorial*, 887 F.2d 1535, 1538 (11th Cir. 1989). "Where the injunction turns on the resolution of bitterly disputed facts, however, an evidentiary hearing is normally required to decide credibility issues." *Id.*

Because the district court rejected the Networks' proffer of SHVA and Improvement Act noncompliance, the only record evidence on this bitterly contested issue was Hawkins' declarations. The court, however, rejected portions of Hawkins' affidavit and adopted an inference advanced by the Networks which had no support in the record. Had the court held an evidentiary hearing, it would have been free to discount

the drastic remedy of a nationwide injunction should be based on stronger evidence than we find in this record.

Also, the district court erred in finding willful and repeated violations from EchoStar's failure to come forward with evidence that its pre-July 1998, PrimeTime-derived subscribers, qualify as "unserved." The district court reached this conclusion by erroneously relying on what it perceived to be a concession by Charles Ergen, EchoStar's president and Chief Executive Officer, that EchoStar did not attempt to determine the eligibility of its pre-July 1998 subscribers until September of 1999.

Ergen's affidavit discusses EchoStar's testing of pre-July 1998 subscribers under the new ILLR model, and indicates the results will be available soon. Ergen's affidavit also suggests that EchoStar did in fact test all of its subscribers to ensure SHVA compliance. The Networks argue that because Ergen's affidavit states only that EchoStar tests "potential subscribers," this demonstrates that EchoStar only screens new customers, and not its pre-July 1998 subscribers.

The Networks' interpretation of Ergen's affidavit, which the district court embraced, is plausible. We, however, did not read Ergen's statements that way. In the face of two plausible interpretations of evidence submitted to demonstrate a contested issue, the district court is not at liberty to accept one construction of the evidence and

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Hawkins' statements as uncredible. However, on the face of Hawkins' affidavits and the Networks' arguments, the court was not at liberty to make such a credibility determination or inferential leap on this contested issue without the benefit of an evidentiary hearing.

reject the other without the benefit of an evidentiary hearing.[19] *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1312 (11th Cir. 1998). In the absence of an evidentiary hearing, we cannot conclude that what we know from the instant, sparse record about Echostar's handling of its pre-July 1998, subscribers adds much to the resolution of the substantial likelihood of success issue.

3. Conclusion

In light of the district court's rejection of the only evidence adduced by the Networks, and in light of our holding that the only other evidence – Hawkins' declaration pertaining to [sic] only to five markets – is insufficient by itself to support factual findings regarding EchoStar's nationwide market, we hold that the district court's application of the twenty-percent rule was flawed.

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[19] The court not only engaged in improper speculation here, but ultimately avoided another critical question: Do the pre-July 1998 subscribers qualify as "unserved?" With the passage of the Improvement Act, there is a likelihood that many of EchoStar's pre-July 1998 subscribers were grandfathered into the Act's statutory copyright license. *See, e.g.*, 17 U.S.C. § 119(e) (extending the statutory copyright license until 2004 for subscribers who do not receive a Grade A signal and who "had satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999"). The district court failed to examine or recognize that many of EchoStar's pre-July 1998 subscribers might otherwise be eligible under the Act whether or not the subscriber qualified as "unserved" under § 119(d)(10)(A). This contested issue may have considerable relevance to the substantial likelihood of success issue and should have been explored by the court before entering this sweeping nationwide preliminary injunction.

We also hold that the evidence in the instant record with respect to Echostar's delay in achieving compliance and its actions with respect to correcting violations is less than dispositive. We cannot sustain the drastic remedy of a nationwide preliminary injunction on a record as sparse as this. Accordingly, we conclude that the district court abused its discretion in granting this nationwide preliminary injunction.[20] On remand, the Networks will have an opportunity to adduce evidence in an attempt to satisfy their initial burden, and if the Networks offer sufficient proof to warrant reasonable inferences on a nationwide scope so as to trigger the statutory presumption that Echostar is servicing "served households" across the country, then Echostar will have an opportunity to rebut the presumption in one or more of the ways provided for in the statute and regulations.

D. First Amendment

Next, EchoStar attacks the constitutionality of SHVA and the Improvement Act under the First Amendment.[21] It contends that distant network programming is speech, and that SHVA and the Improvement Act restrict such speech by prohibiting programming that subscribers are

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[20] Because of this conclusion, we need not address the parties' remaining arguments as to the other the [sic] prerequisites for the issuance of a preliminary injunction, but remand for the reconsideration of each of the other three elements as well.

[21] EchoStar also argues that the vagueness and overbreadth of the preliminary injunction violates the First Amendment. Because we vacate the preliminary injunction, we need not address these arguments at this time.

legally entitled to receive. EchoStar argues that SHVA and the Improvement Act are premised on a content-based governmental judgment that viewers should watch local programming rather than distant network programming and such content-based restrictions violate the First Amendment. We find EchoStar's First Amendment challenge to be wholly without merit.

The copyright laws, which are explicitly sanctioned by the Constitution, *see* U.S. Const. Art. I, § 8, provide adequate First Amendment protection by protecting only expression, not facts and ideas. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556, 105 S. Ct. 2218, 2228 (1985). Indeed, copyright laws are "engine[s] of free expression" that "establish[ ] a marketable right to the use of one's expression" and thereby "suppl[y] the economic incentive to create and disseminate ideas." *Id.* at 558, 105 S. Ct. at 229. In *Harper & Row v. Nation Enterprises*, the Supreme Court rejected the suggestion that the First Amendment requires broader exceptions to the copyright laws than those explicitly conferred by Congress. *See id.* at 560, 105 S. Ct. at 2230 ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, . . . we see no warrant for expanding the doctrine of fair use . . . " on First Amendment grounds.). We follow such reasoning in rejecting the instant challenge.

Nothing in SHVA or the Improvement Act restricts the content of EchoStar's programming. Instead, SHVA, as amended by the Improvement Act, creates a narrow exception to the generally applicable, and constitutional, Copyright Act. Thus, contrary to EchoStar's contention,

the Act does not threaten its free speech rights but actually permits more speech than EchoStar would constitutionally be entitled to under the Copyright Act. The First Amendment does not require any broader exceptions to the Copyright Act than Congress has conferred through SHVA and the Improvement Act's narrow copyright licenses. *See id.* at 560, 105 S. Ct. at 2230.

EchoStar argues that SHVA's "unserved household" restriction is a special rule for satellite carriers which is premised on an impermissible content-based governmental judgment that viewers should watch local programming rather than distant. It contends SHVA is conditioned in an unconstitutional manner by its preference for localism.

Even if EchoStar's provision of distant network programming is "speech" under the First Amendment,[22]

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[22] We assume *arguendo* that the provision of distant network services constitute speech under the First Amendment. In *Turner Broadcasting System, Inc. v. FCC*, 515 U.S. 622, 636, 114 S. Ct. 2445, 2456 (1994), the Supreme Court explained that "[t]hrough 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.' " *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568-69, 115 S. Ct. 2338, 2346 (1995) (explaining that "[c]able operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others"). While EchoStar does not select the programming aired on the Networks' channels, it does "exercis[e] editorial discretion over which stations or programs to include in its repertoire," insofar as it chooses which Network channels to provide through

which we need not and do not decide at this time, SHVA and the Improvement Act's restrictions on that speech are content neutral and serve important governmental interests unrelated to the suppression of speech. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643, 114 S. Ct. 2445, 2459 (1994), the Supreme Court explained that "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S. Ct. 2118, 2128 (1984); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S. Ct. 2559, 2564 (1981)). Applying this standard in *Turner*, the Court rejected cable operators First Amendment challenge to the Cable Television Consumer Protection and Competition Act of 1992, which made it compulsory to include local commercial and public broadcasting stations in the cable operator's line-up. *Turner* reasons that while the must carry rules impose numerous burdens on cable operators, none of the burdens are related to speech. *Id.* at 644-46, 114 S. Ct. at 2460-62. Instead, the Court found that "Congress designed the must carry provisions not to promote speech of a particular content, but to . . . ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming – whatever its content." *Id.* at 649, 114 S. Ct. at 2462.

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distant network programming. Because we reject EchoStar's First Amendment challenge on other grounds, we need not decide whether the provision of distant network programming is speech, but assume *arguendo* that such is the case.

The instant case is a fortiori from *Turner*. Localism in SHVA and the Improvement Act is not preferred for anything related to the content of the local broadcasts. Instead, Congress limited the benefit of the compulsory copyright license to achieve the limited goal of providing access to network programming for households that cannot otherwise receive such programming, *see* 17 U.S.C. § 119(d)(10)(A), while creating the least possible interference with Networks' copyrights. Balancing the two, SHVA, as amended by the Improvement Act, merely gives households, who could not otherwise receive local network programming through an over-the-air broadcast, the option of receiving network programming from a satellite carrier. Because the beneficiaries of this right include only households that cannot otherwise receive local network programming, the Networks' copyrights are not threatened. In this sense, the Act strikes a balance between protecting the copyright interests of the Networks and the public interest in obtaining network programming, whatever its content, for all Americans.

EchoStar's argument – that the statute is content based because the effect of its operation prefers local network programming – is flawed for the same reason a similar argument failed in *Turner*. Indeed, the Congressional purpose in the instant case is even more unrelated to content than in *Turner*. Here, Congress sought merely to facilitate access to Network programming for those households that cannot otherwise receive the same – *i.e.*, for "unserved households." "Unserved households" are, *inter alia*, those unable to receive adequate signal strength. *See* 17 U.S.C. § 119(d)(10)(A). The fact that the source of the best candidate for a satisfactory signal

strength is local is a function of geography and physics, not a Congressional purpose to prefer local speech. In other words, the mere fact that the signal strength is measured from sources which are "local" with respect to any particular household is a necessary, but entirely incidental, function of measuring eligibility. Accordingly, the narrow, compulsory license of SHVA, as it is amended by the Improvement Act, is not content-based, but is merely a Congressional preference that all Americans have access to network programming, wherever they live.

A content-neutral restriction "that impose[s] incidental burdens on speech," will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner*, 512 U.S. at 662, 114 S. Ct. at 2469 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)).

SHVA's purpose of providing a limited license to retransmit network programming to unserved private residences, *see* H.R. Rep. No. 100-887 (II), at 19-20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5648-49,[23] is supported by

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[23] The House Report supporting SHVA explains that the statutory license is provided "for the sole purpose of facilitating the transmission of each network's programming to . . . areas which are unserved by that network." *See* H.R. Rep. No. 100-887 (II), at 19-20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5648-49. The "Committee believe[d] that this approach w[ould] satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system."

the substantial government interest of ensuring that Americans who cannot otherwise receive network programming have access to it, whatever its content. Such an interest is unrelated to the suppression of speech, and indeed serves a governmental purpose of the "highest order" by promoting the dissemination of speech. *See Turner*, 512 U.S. at 663, 114 S. Ct. at 2470 ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment"). Whatever limits Congress placed on SHVA's license is motivated by and consistent with the dual goals of the copyright laws to promote the dissemination of creative expression, and provide incentives for copyright owners to produce such original works. Both purposes are well within constitutional bounds, as Congress has the authority to define the contours of copyright law, *see* U.S. Const. art. I, § 8 cl. 8, and the monopoly privilege created by the Copyright Act is designed to secure the benefits of an author's creation for the public, *see Sony v. Universal City Studios*, 464 U.S. 417, 429, 104 S. Ct. 774, 782 (1984). Such precise tailoring certainly survives scrutiny, intermediate or otherwise.[24]

Id. at 20. Thus, in extending SHVA's statutory license, the "Committee intend[ed] . . . to satisfy both aspects of the public interest – bringing network programming to unserved areas while preserving the exclusivity that is an integral part of today's network affiliate relationship." *Id.*

[24] We need not decide whether SHVA or the Improvement Act impose even incidental burdens on speech. Instead, we assume *arguendo* that it does because the challenged statutes even survive the more heightened inquiry attending intermediate scrutiny.

To the extent that SHVA or the Improvement Act provide a special rule for satellite carriers, this rule is more permissive, and is indeed an exception to the general restrictions in § 106 of the Copyright Act, *see* 17 U.S.C. § 106 (conferring exclusive rights to use in copyright owner). Merely because EchoStar would like this license to be broader than Congress envisioned it does not mean that it infringes on the First Amendment. There is "no first amendment right to . . . make commercial use of the copyrighted works of others." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989) (rejecting cable operators challenge to the compulsory license granted it by 17 U.S.C. § 111 based on the notion that the statute's failure to include authorization for rebroadcasting syndicated programming violates the First Amendment). Accordingly, we reject EchoStar's First Amendment challenge as meritless.

E. Transferability of Grandfathered Rights under § 119(e)

Lastly, EchoStar asks us to revisit the district court's judicial interpretation of 17 U.S.C. § 119(e) (West Supp. 2001). Subsection (e) is one of the Improvement Act's grandfathering provisions, which provides:

> **(e) Moratorium on copyright liability.** – Until December 31, 2004, a subscriber who does not receive a signal of Grade A intensity (as defined in the regulations of the F[CC] . . . under section 73.683(a) of title 47 of the C[FR] . . . , as in effect on January 1, 1999, or predicted by the F[CC] . . . using the I[LLR] . . . methodology described by the F[CC] . . . in Docket No.

> 98-201) of a local network television broadcast station shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber had satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999.

17 U.S.C. § 119(e) (West Supp. 2001). The dispute here is whether subscribers may transfer to a different satellite carrier and retain their rights to receive distant network signals under § 119(e).

Addressing this question, the district court reasoned that § 119(e) is "silent, and therefore ambiguous, as to whether a subscriber 'shall remain eligible to receive signals of network stations' only from his or her previous satellite service provider, or from any satellite service provider." Finding the statute ambiguous, the court turned to the legislative history, and specifically focused on the Conference Committee Report accompanying the Improvement Act, which states that "grandfathered status is not transferable to a different carrier . . . ," *see* Conf. Rep., 146 Cong. Rec. H11794 (daily ed. Nov. 9, 1999).[25]

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[25] The Conference Committee Report for the Improvement Act explains that:

> [t]he words "shall remain eligible" in section 119(e) refer to eligibility to receive stations affiliated with the same network from the same satellite carrier through use of the same transmission technology at the same location; in other words, grandfathered status is not transferable to a different carrier . . .

Conf. Rep., 146 Cong. Rec. H11794 (daily ed. Nov. 9, 1999).

Based on this Report, the court held that "grandfathered status is not transferable to a different carrier."

EchoStar argues that the district court erred in looking to legislative history because the plain language of the statute is clear. It contends that the district court rewrote the statute when it read into it a transfer limitation because no such restriction is found in § 119(e)'s plain language.

This Circuit's "decisions . . . mandat[e] that ambiguity in statutory language be shown *before* a court delves into legislative history." *PrimeTime 24*, 245 F.3d at 1224 (citing *United States v. Veal*, 153 F.3d 1233, 1245 (11th Cir. 1998) ("Review of legislative history is unnecessary unless a statute is inescapably ambiguous.") (citation and quotation omitted)). Thus, in this Circuit, " '[w]e begin our construction of [a statute] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.' " *Id.* at 1222 (quoting *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc)).

Accordingly, our first task in construing § 119(e) is to determine its plain meaning and whether its terms are ambiguous. *See id.* The meaning of § 119(e) is clear: It grandfathers all subscribers who do not receive at least a Grade A signal, as defined by the FCC, if that subscriber's satellite service of such network was terminated between July 11, 1998, and October, 31, 1999, as required by § 119, or if the subscriber received such service on October 31, 1999.

For the reasons discussed below, we conclude that § 119(e) is unambiguous and does not include a condition of nontransferability. First, its plain and clear language confers eligibility upon subscribers:

> a subscriber . . . shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber has satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999.

17 U.S.C. § 119(e). Eligibility belongs to the subscriber, and nothing is said in the statute about carriers. In particular, the subscribers' eligibility is not conditioned on remaining with the same carrier.

Second, the statute expressly limits the rights conferred to the "same network," stating that the subscriber "shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber has satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999." Persuasively, then, the statute contains a "same network" requirement but does not contain a "same carrier" restriction.

Finally, the statutory provision is crafted with great precision. It applies only to subscribers who do not receive a signal of grade A intensity, and only to subscribers falling within certain very specific date restrictions. With such precision, we cannot assume that Congress stated one condition, *i.e.*, the same network, but inadvertently omitted to state another condition which

would prohibit a subscriber's change of carrier. The fact that the statutory provision confers a benefit upon the subscriber, and not the carrier, makes us doubt that that Congress intended to benefit then extant carriers by locking subscribers in to their carrier as of October 31, 1999.[26]

In any event, we need not speculate into such motives, as "[w]e are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . is not to construe the Act but to amend it." *Fodorenko v. United States*, 449 U.S. 490, 513, 101 S. Ct. 737, 750 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38, 55 S. Ct. 31, 36 (1934)). "It is not the function of the courts to amend statutes under the guise of 'statutory construction.' " *Id.* at 514 n.35, 101 S. Ct. at 751 n.35; *United States v. Cooper Corp.*, 312 U.S. 600, 605, 61 S. Ct. 742, 744 (1941) ("It is not our function to engraft on a statute additions which we think the legislature logically might or should have made."). Because § 119(e) is unambiguous and fails to contain a transferability restriction, we refuse to read a "same carrier" limitation into the statute.

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[26] The Networks' interpretation also seems inconsistent with the fact that the provision grandfathers certain subscribers whose service was terminated before October 31, 1999. The Networks' interpretation would seem to imply that such terminated subscribers could "remain eligible" only by resubscribing with the particular carrier which terminated them. While that concept is not entirely unthinkable, it certainly is not stated in the statute, and it points up the magnitude of the additions to the statute which the Networks urge us to engraft onto the provision.

Furthermore, we will not consult the Conference Committee Report, as resort to legislative history is unnecessary, and indeed, improper, where the statute's terms are plain and unambiguous. *See, e.g., Circuit City Stores, Inc. v. Adams*, ___ U.S. ___, 121 S. Ct. 1302, 1311 (2001) (refusing to examine legislative history where the face of the statutory provision was unambiguous); *Ratzlaf v. United States*, 510 U.S. 135, 147, 114 S. Ct. 655, 662 (1994) (Even where "[t]here are . . . contrary indications in the statute's legislative history . . . we do not resort to legislative history to cloud a statutory text that is clear."); *PrimeTime 24*, 245 F.3d at 1224 n.2 ; *Harris*, 216 F.3d at 976 ("When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of statutory language."); *Veal*, 153 F.3d at 1245 ("Review of legislative history is unnecessary unless a statute is inescapably ambiguous"). We must adhere to this principle because "it is ultimately the provisions of our laws rather than the principal concern of our legislators by which we are governed." *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1338 (11th Cir. 1999) (en banc) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S. Ct. 998, 1002 (1998)). Section 119(e)'s plain and unambiguous terms do not contain a transferability limitation, and we reverse the district court's attempt to engraft such a restriction onto the statute.

III. CONCLUSION

For the foregoing reasons, we hold that the district court abused its discretion in granting the nationwide preliminary injunction. Accordingly, we vacate the preliminary injunction, and remand for further proceedings not inconsistent with this opinion. In arriving at our decision, with respect to the transferability issue, we reverse the district court's interpretation of § 119(e), and we affirm the district court's rejection of Echostar's First Amendment challenge.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CBS BROADCASTING, INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORPORATION, et al.,

Defendants.

CASE NO. 98-2651-CIV-NESBITT

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

ECHOSTAR COMMUNICATIONS CORPORATION, et al.,

Plaintiffs,

vs.

CBS BROADCASTING, INC., et al.,

Defendants.

(Filed Sep. 29, 2000)

CASE NO. 99-6382-CIV-NESBITT

This cause comes before the Court upon numerous motions, including the network parties' Motion for Preliminary Injunction (D.E. #20 in case no. 98-2651-CIV-NESBITT).

CBS Broadcasting Inc., Fox Broadcasting Co, ABC, Inc., National Broadcasting Co., Inc., CBS Television Network Affiliates Association, FBC Television Affiliates Association, ABC Television Affiliates Association, and

NBC Television Affiliates (collectively, "the network parties") are the owners of the ABC, CBS, Fox, and NBC television networks, and are trade associations which represent ABC, CBS, Fox, and NBC-affiliated network stations.

EchoStar Communications Corporation d/b/a DISH Network and its subsidiaries EchoStar Satellite Corporation, Satellite Communications Operating Corporation, and DirectSat Corporation (collectively, "EchoStar") provide television programming by satellite to owners of small satellite dishes.

EchoStar markets to its subscribers two packages of network signals which include signals from ABC, CBS, Fox, and NBC affiliates in New York City and Los Angeles. The network parties claim that EchoStar's transmission of these network signals infringes their federally-protected copyrights in numerous television programs.

MOTION FOR PRELIMINARY INJUNCTION

The network parties have moved for a preliminary injunction to prohibit EchoStar from continuing to infringe their copyrights. "Preliminary injunctions are a common judicial response to the imminent infringement of an apparently valid copyright." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979); *see also In re Capita Cities/ABC, Inc.*, 918 F.2d 140, 144 (11th Cir. 1990). However, the Court may issue a preliminary injunction only if the network parties establish: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury; (3) that their own injury would outweigh the injury to EchoStar; and (4)

that the injunction would not disserve the public interest. *See, e.g., Tefel v. Reno,* 180 F.3d 1286, 1295 (11th Cir. 1999), *cert. denied,* 120 S. Ct. 2657 (2000); *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.,* 51 F.3d 982, 985 (11th Cir. 1995).

EchoStar asserts that the network parties have not established any of the four factors. As discussed below, the Court finds that the network parties have established all four factors. The Court therefore will issue a preliminary injunction against EchoStar.

1. Substantial likelihood of success

"Likelihood of success is the touchstone of the preliminary injunction inquiry." *Philip Morris, Inc. v. Harshbarger,* 159 F.3d 670, 674 (1st Cir. 1998). Of course, this fact does not obviate the requirement that the network parties establish all four factors in order to obtain a preliminary injunction. *See, e.g., Illinois Tool Works, Inc. v. Grip-Pak, Inc.,* 906 F.2d 679, 682 (Fed. Cir. 1980) ("Likelihood of success is an important factor, but no court has held it alone determinative and ignored all three of the other factors.").

The Copyright Act grants the owner of a copyright in an audiovisual work such as a television program the exclusive right to perform that copyrighted work publicly or to authorize a public display or performance of the work. *See* 17 U.S.C. § 106. There is no dispute that the numerous network television programs at issue are original audiovisual works fixed in a tangible medium of expression, and therefore are copyrightable subject matter. *See* 17 U.S.C. § 102.

To establish a substantial likelihood of success on the merits, the network parties must demonstrate a *prima facie* case of copyright infringement, i.e., that: (1) they own exclusive rights under the Copyright Act in the works at issue; and (2) EchoStar has infringed those rights. *See, e.g., Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1985). Additionally, EchoStar's transmission of the network parties' signals must be "willful or repeated. . . . " 17 U.S.C. § 119(a)(5)(A).

Ownership

The network parties have submitted uncontroverted affidavits and certificates of copyright registration which demonstrate that they own copyrights in the network programs which are at issue in this action. *See* Compl., Exh. A; Declarations and Exhibits in Support of Plaintiffs' Motion for Preliminary Injunction, D.E. #22, Exhs. 3 (Goodspeed Decl.), 4 (Kryle Decl.), 5 (Lusins Decl.), 7 (Taylor Decl.).

Infringement

There is no dispute that EchoStar is a "satellite carrier," 17 U.S.C. § 119(d)(6), that EchoStar has publicly performed the programs at issue by transmitting them to its many subscribers, and that the network parties did not license EchoStar to transmit their programs, *see* Goodspeed Decl., ¶6; Kryle Decl., ¶6; Lusins Decl., ¶ 6; Taylor Decl, ¶ 6. The parties disagree, however, whether EchoStar's satellite transmission of those programs infringed the network parties' copyrights. The parties' dispute

focuses on whether the Satellite Home Viewer Act authorizes EchoStar to transmit the programs to its subscribers.

Specifically, the parties disagree as to the application of a narrow exception to a network's exclusive copyright in its programming which is found in the Satellite Home Viewer Act. The Act creates a compulsory license which allows satellite carriers to deliver distant network programming to certain satellite dish owners without the copyright owner's permission. Absent the network parties' permission, however, the compulsory license allows EchoStar to transmit distant network programming only to "unserved households." 17 U.S.C. § 119(a)(2)(B)(I); *see CBS Inc. v. Primetime 24 Joint Venture*, 9 F. Supp.2d 1333, 1335-37 (S.D. Fla. 1998). In relevant part, an "unserved household" is

> a household that –
>
> > (A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of Title 47 of the Code of Federal Regulations, as in effect on January 1, 1999[1]. . . .

17 U.S.C. § 119(d)(10).

At trial, EchoStar will have the burden to prove that its transmission of distant network programming goes

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[1] In 47 C.F.R. § 73.683(a), the FCC defined Grade B intensity in terms of signal strength: 47 dBu for television channels 2-6, 56 dBu for television channels 7-13, and 64 dBu for television channels 14-69. In that same selection, the FCC defined Grade A as a stronger signal, i.e. with higher dBu levels.

only to "unserved households." 17 U.S.C. § 119(a)(5)(D); *see CBS Inc.*, 9 F. Supp.2d at 1340-41. Although the network parties bear the burden of proof on their motion for preliminary injunction, "the court must consider that the ultimate burden of proof at trial is upon the nonmovant." *CBS Inc.*, 9 F. Supp.2d at 1340; *see Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 336-38 (5th Cir. 1981) (in assessing likelihood of success on the merits, court took into account nonmovants' ultimate burden of proof); *Religious Tech. Ctr. v. NetCom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231, 1242 n.12 (N.D. Cal. 1995) ("Even though fair use is an affirmative defense, . . . the court notes that plaintiffs, as the parties moving for a preliminary injunction, have the burden of proving a likelihood of success on their infringement claim, including the fair use defense. . . . However, in determining whether plaintiffs have met their burden, the court recognizes that fair use is an affirmative defense on which defendants will have the burden of proof at trial.").

The network parties therefore "can establish likelihood of success on the merits by demonstrating that [EchoStar] is unlikely to prove at trial that its subscribers are 'unserved households.' " *CBS*, 9 F. Supp.2d at 1341. Congress has clarified that to "determin[e] presumptively whether a person resides in an unserved household . . . , a court shall rely on the Individual Location Longley-Rice model ["ILLR"] set forth by the Federal Communications Commission in Docket No. 98-201, as that model may be amended by the Commission over time. . . . " 17 U.S.C. § 119(a)(2)(B)(ii)(I).

In support of their Motion for Preliminary Injunction, the network parties have submitted Jules Cohen's Second

and Third Supplemental Declarations, in which he used the ILLR method to analyze EchoStar's subscribers in thirty-five randomly-selected television markets. *See* D.E. #73, 149. According to Mr. Cohen, in thirty-three of the thirty-five markets which he analyzed, his ILLR maps predicted that a majority of EchoStar's subscribers as of October, 1998, received signals of at least Grade B intensity. *See* Cohen Second Suppl. Decl., at 5 ¶8 & Exhs. A, C. In thirty of those thirty-five markets, Mr. Cohen's ILLR maps predicted that a majority of subscribers whom EchoStar signed up for service in October, November, and December, 1998, received signals of at least Grade B intensity. *See* Cohen Second Suppl. Decl., at 5-6 ¶9 & Exhs. B, D.

Overall, Mr. Cohen's ILLR maps suggest that 113,973 subscribers as of October, 1998, i.e. 76.0% of EchoStar's subscribers in those thirty-five markets, were predicted to receive signals of at least Grade B intensity. In fact, 91,546 of those subscribers, i.e. 61.0% of EchoStar's subscribers in those thirty-five markets, were predicted to receive stronger signals of Grade A intensity.

Mr. Cohen's maps also suggest that 27,078 subscribers whom EchoStar signed up for service in October, November, and December, 1998, i.e. 64.6% of the analyzed subscribers whom EchoStar signed up for service in those thirty-five markets, were predicted to receive signals of at least Grade B intensity. Additionally, 19,907 of those subscribers, i.e. 47.5% of the analyzed subscribers whom EchoStar signed up for service in those thirty-five markets during those three months, were predicted to receive the stronger Grade A intensity signals.

According to Mr. Cohen's maps, 1,266 subscribers whom EchoStar signed up for service in five markets between November, 1999, and January, 2000, i.e. 47.9% of the subscribers whom EchoStar signed up for service in those markets during that period, were predicted to receive signals of at least Grade B intensity. Additionally, 753 of those subscribers, i.e. 28.5%, were predicted to receive Grade A intensity signals.

There is, however, one problem with Mr. Cohen's ILLR maps which suggests that those maps overstate the number of unserved households to which EchoStar transmits distant network programming. The Court therefore will not rely on Mr. Cohen's maps or his Declaration testimony.

Prior to July 1, 1999, Congress defined "local market" as "the area encompassed within a network station's predicted Grade B contour as that contour is defined by the Federal Communications Commission." 17 U.S.C.A. § 119(d)(11) (1996). The ILLR maps upon which Mr. Cohen relied use the FCC-predicted Grade B contours, consistent with the SHVA's definition of "local market area" prior to July 1, 1999. *See* D.E. #73 at 2 ¶ (a), at 3 ¶ (b); Second Suppl. Decl. of Jules Cohen, at 1 ¶1 ("the majority of EchoStar's subscribers *within FCC-predicted Grade B contours*") (emphasis added); Third Suppl. Decl. of Jules Cohen, at ¶ 3 (noting that Mr. Cohen used the FCC-predicted Grade B contours); Tr. of Prelim. Inj. Hearing, at 61-63 (Mr. Olson discusses use of Grade B contour); *see also* Tr., at 43.

Effective July 1, 1999, however, Congress amended the definition of "local market" to mean "the designated

market area in which a station is located. . . . " 17 U.S.C.A. § 119(d)(10) & 122(j)(2)(A) (Supp. 2000). The maps upon which Mr. Cohen relied failed to take into account the designated market area, which the network parties' counsel, Mr. Olson, acknowledged would result in lower percentages of unserved households. *See* Tr., at 61-63.

Because Mr. Cohen relied on ILLR maps which did not take into account the appropriate "local market," the Court cannot accept those maps or Mr. Cohen's testimony as accurately representing the number of unserved households to which EchoStar allegedly provides distant-network signals.

However, the evidence which EchoStar submitted demonstrates that EchoStar likely provides distant network transmissions to numerous households which are not "unserved." EchoStar submitted the Declaration of Michael R. Hawkins, an EchoStar employee whose responsibilities include "assisting EchoStar in its continuing efforts to comply with the Satellite Home Viewer Act. . . . " Hawkins Decl., D.E. #97, ¶4.

Mr. Hawkins generated ILLR maps for five of the thirty-five markets which Jules Cohen mapped. In part because Mr. Hawkins's maps define the local market as the designated market area, Mr. Hawkins's and Mr. Cohen's maps produced different numbers of unserved households in each of the five mapped areas.

Although Mr. Olson pointed out at least one possible problem with Mr. Hawkins's maps, *see* Tr., at 66, for purposes of the preliminary injunction the Court will accept as accurate Mr. Hawkins's Declaration testimony

and his analysis of the ILLR maps. His testimony and analysis demonstrate that in five designated market areas, EchoStar likely provides distant network programming to thousands of households which are not "unserved."

Mr. Hawkins's ILLR maps predict that: in Chicago, 2,171 subscribers (39.33% of EchoStar's subscribers in that market) receive a signal of Grade B strength or stronger; in San Francisco, 4,451 subscribers (44.48% of EchoStar's subscribers in that market) receive a signal of Grade B strength or stronger; in Washington, D.C., 321 subscribers (3.07% of EchoStar's subscribers in that market) receive a signal of Grade B strength or stronger; in Dallas-Fort Worth, 2,659 subscribers (32.72% of EchoStar's subscribers in that market) receive a signal of Grade B strength or stronger; and in Memphis, Tennessee, 354 subscribers (7.01% of EchoStar's subscribers in that market) receive a signal of Grade B strength or better.

Therefore, ILLR predicts that 9,956 people in five markets – i.e., 25.27% of EchoStar's 39,397 subscribers in those markets – receive a signal of Grade B intensity or higher, and presumptively do not reside in unserved households. *See* 17 U.S.C. § 19(a)(2)(B)(ii)(I).

In an apparent effort to rebut the presumption that these 9,956 subscribers do not reside in unserved households, Mr. Hawkins states that "[c]ertain subscribers are included in the sorting even though they have obtained [waivers from the appropriate network affiliates] or cannot, in fact, receive a Grade B signal from the network affiliates within the subscriber's [designated market area]

as confirmed by actual field testing."[2] Hawkins Decl., at 5 ¶17. Although Mr. Hawkins stated that "certain" households have obtained waivers or been subjected to field testing, he did not state or suggest that *all* or even *most* of the 9,956 households which his ILLR maps predict are not unserved have obtained waivers or have been subjected to individual field testing. His use of the phrase "certain subscribers" is vague, and requires the Court to speculate or guess whether he referred to two, ten, a thousand, or any other number of subscribers. The Court cannot engage in such speculation. *See, e.g., Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1518 (11th Cir. 1988) ("[A]n inference based on speculation and conjecture is not reasonable."); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985); *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1983). Additionally, there is no evidence before the Court, apart from Mr. Hawkins's conclusory but unspecific statement, that any of the 9,956 households actually are "unserved."

EchoStar also submitted the Declaration of Charlie Ergen, *see* D.E. #104, EchoStar Satellite Corporation's Chairman, President, and Chief Executive Officer, and Satellite Communications Operating Corporation's ("SCOC") President. Mr. Ergen testified that SCOC is responsible for Satellite Home Viewer Act compliance with respect to EchoStar's satellite delivery of distant network channels. *See* Ergen Decl., at 2 ¶5.

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[2] In its February 1, 1999 Report and Order, the FCC endorsed field testing of individual households as a method to rebut an ILLR-map presumption that those individual households are unserved.

According to Mr. Ergen, since an unspecified time in 1999 when SCOC received ILLR model software and a database from a company called DataWorld, it has been SCOC's policy to use the ILLR model to determine whether prospective subscribers are eligible to receive distant network programming. *See* Ergen Decl., at 5 ¶12. If the ILLR model predicts that a prospective subscriber can receive a signal of Grade A or B intensity with respect to a particular network, then SCOC will not provide the prospective customer with distant network programming as to that network unless the customer receives a waiver from the network, or unless a field strength test reveals that the customer actually cannot receive a signal of at least Grade B intensity. *See* Ergen Decl., at 6-7, ¶¶16-17.

However, Mr. Ergen concedes that as of September 20, 1999, SCOC had not yet run the ILLR model as to EchoStar subscribers who received distant network programming before July 21, 1998. *See* Ergen Decl., at 8 ¶20. Mr. Ergen testified only that SCOC had completed negotiations with a firm to have those subscribers' households run through the ILLR model. *See id.* Although Mr. Ergen stated that the subscriber list likely would be provided to that firm during the week of September 20, 1999 for such testing, almost one year has passed since that date and EchoStar has not informed the Court that the testing occurred, or apprized [sic] the Court of the results of that testing.

In his Declaration, Mr. Ergen did not specifically testify that *any* of the subscribers in the 9,956 households which Mr. Hawkins's ILLR maps predict are not "unserved" received waivers or obtained field tests which indicated that they actually are unserved. The

Court is left to speculate as to how many – if any – of those 9,956 households obtained waivers or were subjected to field tests, as opposed to being households which received distant network programming before July 21, 1998, and which SCOC and EchoStar have not yet subjected to ILLR tests. Again, the Court may not engage in such speculation. *See, e.g., Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1518 (11th Cir. 1988). Mr. Ergen's Declaration does not allow the Court to conclude that any of the 9,956 households received waivers or were subjected to field tests which demonstrated that they are unserved.

Thus, Mr. Hawkins's declaration demonstrates that 9,956 people in five markets – i.e., 25.27% of EchoStar's 39,397 subscribers in those markets – receive a signal of Grade B intensity or higher, and "presumptively . . . [do not] reside[ ] in . . . unserved household[s]. . . . " 17 U.S.C. § 119(a)(2)(B)(ii)(I). Despite the fact that EchoStar submitted two affidavits in an effort to demonstrate its compliance with the Satellite Home Viewer Act, there is no record evidence which demonstrates that a definite or significant number of those 9,956 households are not "unserved."

Because the record evidence demonstrates that EchoStar transmits distant network signals to a significant number of households which are not unserved, the network parties have satisfied their burden of demonstrating that EchoStar likely is infringing their copyrights.

Willful or repeated infringement

To be entitled to a preliminary injunction, the network parties must also demonstrate that they likely will be able to prove at trial that EchoStar's infringement was "willful or repeated. . . . " 17 U.S.C. § 119(a)(5)(A). Additionally, the network parties eventually may be entitled to a permanent injunction if EchoStar is engaging "in a willful or repeated pattern or practice" of infringement. 17 U.S.C. § 119(a)(5)(B). The network parties have satisfied their burden of establishing that they likely will be able to demonstrate at trial that EchoStar's infringement is willful and repeated.

This Court endorsed the Longley-Rice propagation methodology in May of 1998. *See CBS Inc. v. Primetime 24 Joint Venture*, 9 F. Supp.2d 1333 (S.D. Fla. 1998). In February of 1999, the FCC endorsed ILLR as a predictive model to determine whether individual subscribers resided in unserved households, and in July of 1999, Congress endorsed the ILLR methodology. *See* 17 U.S.C. § 119(a)(2)(B)(ii)(I). Nevertheless, Michael Hawkins testified that he did not generate ILLR maps which would determine how many of EchoStar's subscribers lived in unserved households until approximately September of 1999. *See* Hawkins Decl., at 2 ¶9. This delay demonstrates a willful desire to avoid compliance with the Satellite Home Viewer Act.

Additionally, the substantial percentage (25.57%) of EchoStar's subscribers in five markets who Mr. Hawkins's ILLR maps predict do not reside in unserved households, combined with the lack of evidence regarding waivers or field test results, supports a finding of a

willful and repeated pattern and practice of infringement. *See* H.R. Rep. No. 100-887(I), at 19 (1988), *reprinted in* 1978 U.S.C.C.A.N. 5611, 5622 ("[I]t is the intent of this statute that no pattern or practice be found if . . . less than 20% of the subscribers to a particular network station . . . are found ineligible.").

The evidence also suggests that EchoStar has not used and does not intend to use reasonable efforts to take corrective actions in light of Mr. Hawkins's findings. EchoStar appears to ignore the fact that this evidence shows that a substantial number and percentage of EchoStar's subscribers in five markets "presumptively . . . [do not] reside[ ] in . . . unserved household[s] . . . ," 17 U.S.C §119(a)(2)(B)(ii)(I), and instead focuses on the fact that the evidence demonstrates that "a majority of EchoStar's current subscribers are . . . predicted to be eligible to receive distant network programming direct from satellite." Hawkins Decl., at 4 ¶16.

Mr. Hawkins does not suggest that a substantial portion of those 9,956 presumptively illegal subscribers received waivers or had field testing performed at their households, but instead states only that "certain subscribers" received waivers or were subjected to field testing. Hawkins Decl., at 5 ¶17. Further, he does not suggest that EchoStar plans to take corrective action with regard to those subscribers who have not obtained waivers or had individual field tests conducted at their households.

Thus, EchoStar is aware that significant numbers of its subscribers presumptively do not reside in unserved households, but has not acknowledged that fact and apparently has taken no corrective action. Such conduct

demonstrates a willful disregard of the Satellite Home Viewer Act.

In his Declaration, Charles Ergen concedes that prior to September of 1999, EchoStar failed to use ILLR technology to determine whether EchoStar's subscribers who received service before July 21, 1998, were eligible to receive distant network programming. There is no evidence that EchoStar discontinued service to those subscribers until it could conduct such testing, and the evidence suggests that EchoStar has not made substantial efforts to comply with the Satellite Home Viewer Act as expeditiously as it could. Notably, almost one year has passed since Mr. Ergen filed his Declaration, and the Court still has no evidence that EchoStar has ensured that its subscribers who received service prior to July 21, 1998, are eligible to receive distant network programming.

Finally, the fact that ILLR maps predict that 25.27% of EchoStar's subscribers in five markets do not live in unserved households, combined with the lack of evidence regarding waivers or field test results, supports a finding of willfulness and a repeated pattern or practice of infringement. Such a high percentage supports a finding that EchoStar has not used reasonable efforts to ensure compliance with the Satellite Home Viewer Act. *See* H.R. Rep. No. 100-887(I), at 19 (1988), *reprinted in* 1978 U.S.C.C.A.N. 5611, 5622 ("[I]t is the intent of this statute that no pattern or practice be found if . . . less than 20% of the subscribers to a particular network station . . . are found ineligible.").

2. Threat of irreparable injury

Because the network parties have established that they are likely to prevail on the merits, they are entitled to a presumption of irreparable injury. *See, e.g., Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288-89 & n.10 (10th Cir. 1996); *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 690 (4th Cir. 1992); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989); *Concrete Mach. Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611 (1st Cir. 1988); *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 267 (6th Cir. 1988); *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 729 (8th Cir. 1986); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983); *Atari, Inc. v. North American Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982); *CBS Inc. v. Primetime 24 Joint Venture*, 9 F. Supp.2d 133, 1344-45 (S.D. Fla. 1998); EchoStar's Memorandum Regarding Rebuttal of the Presumption of Irreparable Harm, D.E. #91, at 3.

On several grounds, EchoStar contends that it has rebutted the presumption of irreparable harm. First, EchoStar claims that the actual harm to the networks is *de minimis* or non-existent because the networks actually benefit from additional satellite viewers, as they increase market share and advertising revenue. The Court disagrees, as individual local network affiliates may lose advertising revenue as a result of EchoStar's provision of distant network signals to households which are not unserved. EchoStar is not entitled to take otherwise illegal actions which shift advertising revenue from one network affiliate to another, and then claim that its

actions are rendered legal because the *total* pool of advertising revenue to all network affiliates does not decrease.

Additionally, as this Court found in *CBS Inc. v. Primetime 24 Joint Venture*, the loss of goodwill that stations suffer when viewers blame them for having their unlawful service terminated constitutes an irreparable, difficult-to-quantify injury. *See CBS*, 9 F. Supp.2d at 1345; Findings of Fact and Conclusions of Law, D.E. #403 in case no. 96-3650-CIV-NESBITT, at 40.

The Court also disagrees with EchoStar's contention that the network parties unreasonably delayed bringing this action. Further, EchoStar's assertion that the signals it transmits to its subscribers do not compete with local network affiliates because those subscribers are incapable of receiving network programming relies on the unproven assumption that EchoStar will be able to rebut the presumption that a substantial number of its subscribers do not reside in unserved households. *See* 17 U.S.C. §119(a)(2)(B)(ii)(I). There is no record evidence that EchoStar will be able to rebut that presumption.

3. Whether the network parties' potential injuries outweigh EchoStar's potential injuries

The network parties have satisfied their burden to demonstrate that their injuries outweigh EchoStar's potential injuries if the Court issues a preliminary injunction. EchoStar asserts that an injunction would severely damage it because it would be forced to breach contracts with hundreds of thousands of subscribers. *See* Defendants' Preliminary Opposition to Motion for Preliminary Injunction, attached to D.E. #56, at 21.

A preliminary injunction will only require EchoStar to stop unlawful activities. EchoStar "cannot build a business on infringements and then argue that enforcing the law will cripple that business." *CBS*, 9 F. Supp.2d at 1345; *see Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) ("Nor can we accept the district court's explanation which stressed the 'devastating effect' of a preliminary injunction on Franklin's business. If that were the correct standard, then a knowing infringer would be permitted to construct its business around its infringement, a result we cannot condone."). The Court finds that the balance of harms favors issuing an injunction.

4. Whether the injunction would disserve the public interest

An injunction would not disserve the public interest because the public interest lies with protecting the rights of copyright owners against infringements. *See, e.g., Apple Computer*, 714 F.2d at 1255; *CBS*, 9 F. Supp.2d at 1345.

NETWORK PARTIES' MARCH 24, 2000, EMERGENCY MOTION FOR HEARING AND FOR IMMEDIATE ISSUANCE OF PRELIMINARY INJUNCTION, AND ECHOSTAR'S REQUEST FOR JUDICIAL INTERPRETATION OF 17 U.S.C. § 119(e)

The network parties also request a preliminary injunction based upon EchoStar's actions in signing up subscribers whom EchoStar believes Congress allows to receive distant network signals pursuant to 17 U.S.C. § 119(e). That subsection provides:

> Until December 31, 2004, a subscriber who does not receive a signal of Grade A intensity . . . of a local network television broadcast shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber had satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999.

17 U.S.C. § 119(e).

In essence, the parties dispute whether this subsection allows EchoStar to sign up for distant network service customers whose [sic] had satellite service *provided by a company other than EchoStar* which was terminated between July 11, 1998, and October 31, 1999. The network parties contend that this subsection allows EchoStar to sign up for distant network service only customers to whom *EchoStar* provided satellite service before it was terminated between July 11, 1998, and October 31, 1999. EchoStar, on the other hand, asserts that § 119(e) allows it to sign up for distant network service customers to whom *other companies*, such as PrimeTime24 and DirecTV, provided satellite service before it was terminated between July 11, 1998, and October 31, 1999.

Notably, EchoStar does not dispute that it has relied on this subsection to sign up for distant network service customers to whom other companies provided satellite service before it was terminated between July 11, 1998, and October 31, 1999. EchoStar contends, however, that regardless of the Court's interpretation of § 119(e), there is no emergency and the network parties are not entitled to injunctive relief. Specifically, EchoStar represents that

in response to the network parties' Motion, it voluntarily terminated distant network programming to all subscribers to whom it provided such services pursuant to § 119(e).

The network parties do not dispute that EchoStar has now terminated distant network programming to all subscribers to whom it provided such service pursuant to § 119(e). Additionally, the network parties have not demonstrated that EchoStar is likely to resume signing up customers for distant network service pursuant to § 119(e). Therefore, the Court will not issue a preliminary injunction as to such conduct. *See, e.g., Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th Cir. 1988); *Snair v. City of Clearwater*, 787 F. Supp. 1401, 1415 (M.D. Fla. 1992) ("Federal courts should not grant injunctive relief when the conduct sought to be stopped has ceased and is unlikely to resume.").

Nevertheless, EchoStar requests that the Court determine which party's interpretation of 17 U.S.C. § 119(e) is correct. The Court will do so.

Section 119(e) is silent, and therefore ambiguous, as to whether a subscriber "shall remain eligible to receive signals of network stations" only from his or her previous satellite service provider, or from any satellite service provider. Because this statutory provision is ambiguous, the Court will look to the legislative history. *See RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992).

In the Conference Report, seven Senators and eleven Representatives stated:

> The words "shall remain eligible" in section 119(e) refer to eligibility to receive stations affiliated with the same network from the same satellite carrier through use of the same transmission technology at the same location; in other words, grandfathered status is not transferable to a different carrier. . . .

Conf. Rep., 146 Cong. Rec. H11794 (daily ed. Nov. 9, 1999).

The Court must give great deference to this Conference Report. *See RJR Nabisco*, 955 F.2d at 1462 ("Indications of congressional intent contained in a conference committee report deserve great deference by courts because 'the conference report represents the final statement of terms agreed to by both houses, [and] next to the statute itself it is the most persuasive evidence of congressional intent.' ") (quoting *Demby v. Schwiker*, 671 F.2d 507, 510 (D.C. Cir. 1981)). The Court therefore concludes that subscribers who had satellite service terminated between July 11, 1998, and October 31, 1999, or who received such service on October 31, 1999, and whom 17 U.S.C. § 119(e) deems eligible to receive satellite broadcasts of distant network signals, may receive those broadcasts only from the same satellite carrier from whom they received satellite service when their service was terminated. In other words, § 119(e)'s "grandfathered status is not transferable to a different carrier. . . . " Conf. Rep., 146 Cong. Rec. H11794 (daily ed. Nov. 9, 1999).

ECHOSTAR'S REQUEST THAT PLAINTIFFS BE REQUIRED TO POST A SIGNIFICANT BOND IN THE EVENT NATIONWIDE RELIEF GRANTED

EchoStar requests that the Court require the network parties to post a one-hundred million dollar bond if the Court issues an injunction. In support of that request, EchoStar contends that its business is worth more than thirty million dollars.

The Court may not issue a preliminary injunction "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c); *see, e.g., Piambino v. Bailey*, 757 F.2d 1112, 1143 (11th Cir. 1985). In light of the Court's findings in support of the preliminary injunction, the Court concludes that a $15,000.00 bond is appropriate.

ECHOSTAR'S MOTION FOR JUDGMENT ON THE PLEADINGS

EchoStar contends that the Satellite Home Viewer Act violates the First Amendment to the United States Constitution. EchoStar challenges Congress's decision to withhold a compulsory license from its transmission of the network parties' copyrighted broadcasts to certain subscribers. EchoStar claims that its transmission of the network parties' copyrighted broadcasts is speech which the First Amendment protects.

In effect, EchoStar seeks to "make commercial use of the copyrighted works of others. There is no first

amendment right to do so." *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989). Therefore, the Court will deny EchoStar's Motion.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. The network parties' Motion for Preliminary Injunction (D.E. **#20** in case no. 98-2651-CIV-NESBITT) is **GRANTED**.

2. EchoStar's Motions for Admission *Pro Hac Vice* of Jonathan H. Massey and Laurence H. Tribe (D.E. **#82 and 83** in case no. 98-2651-CIV-NESBITT) are **GRANTED**.

3. EchoStar's Motion to Stay Proceedings Pending Congress's Resolution of the Pending Satellite Legislation (D.E. **#84** in case no. 98-2651-CIV-NESBITT) is **DENIED as moot**.

4. EchoStar's Motion for Judgment on the Pleadings (D.E. **#86** in case no. 98-2651-CIV-NESBITT) is **DENIED**.

5. EchoStar's Motion to Continue (D.E. **#87** in case no. 98-2651-CIV-NESBITT) is **DENIED as moot**.

6. EchoStar's Motion to Stay Proceedings Pending Resolution of Motion for Judgment on the Pleadings (D.E. **#89**) is **DENIED as moot**.

7. EchoStar's Motion for Evidentiary Hearing (D.E. **#94** in case no. 98-2651-CIV-NESBITT) is **DENIED**. Before, during, and after the September 21, 1999, hearing, the Court gave EchoStar a fair opportunity to oppose the Motion for Preliminary Injunction.

8. EchoStar's Motion to Strike Declarations and to Disqualify Jules Cohen (D.E. **#96** in case no. 98-2651-CIV-NESBITT) is **DENIED**.

9. EchoStar's Request that Plaintiffs be Required to Post a Significant ($100,000,000) Bond (D.E. **#98** in case no. 98-2651-CIV-NESBITT) is **DENIED**.

10. The Network parties' Motions for Admission *Pro Hac Vice* of Bruce J. Ennis, Jr., Nory Miller, and Steven M. Dunne (D.E. **#99, 100, and 130** in case no. 98-2651-CIV-NESBITT) are **GRANTED**.

11. EchoStar's Motion to Strike Record Evidence (D.E. **#117** in case no. 98-2651-CIV-NESBITT and D.E. **#28** in case no. 99-6382-CIV-NESBITT) is **DENIED**.

12. EchoStar's Motion to Dismiss or, in the Alternative, Motion to Stay Proceedings (D.E. **#133** in case no. 98-2651-CIV-NESBITT) is **DENIED**.

13. EchoStar's Motion to Dismiss or, in the Alternative, Motion to Stay Further Discovery Responses (D.E. **#138** in case no. 98-2651-CIV-NESBITT and D.E. **#37** in case no. 99-6382) is **DENIED**.

14. EchoStar's Motion for Court-Ordered Mediation (D.E. **#146** in case no. 98-2651-CIV-NESBITT and D.E. **#43** in case no. 99-6382-CIV-NESBITT) is **DENIED**. However, in the future the Court will direct the parties to participate in mediation.

15. The network parties' Emergency Motion for Hearing and for Immediate Issuance of a Preliminary Injunction (D.E. **#147** in case no. 98-2651-CIV-NESBITT) is **DENIED**.

16. EchoStar's Request for Judicial Interpretation of 17 U.S.C. § 119(e) (D.E. **#155** in case no. 98-2651-CIV-NESBITT and D.E. **#50** in case no. 99-6382-CIV-NESBITT) is **GRANTED** insofar as the Court has interpreted 17 U.S.C. § 119(e), but is **DENIED** in all other respects.

17. The network parties' Stipulation for Substitution of Counsel (D.E. **#157** in case no. 98-2651-CIV-NESBITT) is **APPROVED**. Lott & Friedland, P.A., is substituted as counsel of record for the Network parties in place of Akerman, Senterfitt & Edison, P.A., and Akerman, Senterfitt & Edison, P.A. is relieved from further responsibilities for the representation of the Network parties in this action.

18. EchoStar's Request for Leave to File Surreply (D.E. **#163** in case no. 98-2651-CIV-NESBITT and D.E. **#58** in case no. 99-6382-CIV-NESBITT) is **GRANTED**.

19. EchoStar's Motion for Protective Order (D.E. **#20** in case no. 99-6382-CIV-NESBITT) is **GRANTED in part and DENIED in part**. Unless the parties stipulate to the form of a protective order, the Court will enter a protective order which incorporates elements of each party's proposed order. Within ten (10) days of the date this Order is filed, each party shall submit a diskette containing a Wordperfect (6.0 or higher) version of that party's proposed protective order.

20. EchoStar's Request for Rule 16 Scheduling Conference (D.E. **#23** in case no. 99-6382-CIV-NESBITT) is **DENIED** without prejudice to file an amended request for scheduling conference after the Court issues the preliminary injunction.

21. EchoStar's Opposition to Notice of Congressional Re-Enactment of "Grade B Intensity" Standard and Request for Immediate Entry of Preliminary Injunction, which was docketed as a motion for immediate entry of preliminary injunction (D.E. **#35** in case no. 99-6382-CIV-NESBITT), is **DENIED as moot** for administrative purposes.

DONE and **ORDERED** in Chambers, Miami, Florida, this 28 day of September, 2000.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: David M. Rogero, Esq.
Thomas P. Olson, Esq.
Cynthia A. Ricketts, Esq.
T. Wade Welch, Esq.
Kenneth M. Myers, Esq.
Akerman, Senterfitt & Eidson, [sic] P.A.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 98-2651-CIV (Nesbitt/Johnson)
Case No. 99-06382-CIV (Nesbitt/Johnson)
(Consolidated)

CBS Broadcasting Inc., *et al.*, Plaintiffs,
v.
EchoStar Communications Corporation, *et al.*, Defendants.

EchoStar Communications Corporation, *et al.*, Plaintiffs
v.
CBS Broadcasting Inc., *et al.*, Defendants

PRELIMINARY INJUNCTION

(Filed Sep. 29, 2000)

This case comes before the Court on the Motion for Preliminary Injunction filed on December 2, 1998 by CBS Broadcasting Inc., Fox Broadcasting Co., ABC, Inc., National Broadcasting Company, Inc., CBS Television Network Affiliates Association, FBC Television Affiliates Association, ABC Television Affiliates Association, and NBC Television Affiliates ("plaintiffs"). On consideration of plaintiffs' motion and the supporting factual materials

filed therewith, the Opposition filed by the EchoStar defendants (EchoStar Communications Corporation d/b/a DISH Network, EchoStar Satellite Corporation, Satellite Communications Operating Corporation, and Direct Sat Corporation) (collectively "EchoStar"), the Reply filed by plaintiffs, the hearing held by the Court on September 21, 1999, the supplemental briefs and factual materials filed by the parties, and the entire record herein, and for the reasons set forth in this Court's Order filed herewith, it is hereby

ORDERED and ADJUDGED

that plaintiffs' motion is **GRANTED**. It is further **ORDERED AND ADJUDGED** as follows:

1. *Compliance with Copyright Act.* Pending resolution of this matter on the merits, EchoStar shall not deliver ABC, CBS, Fox, or NBC television network programming to any customer that does not live in an "unserved household" as defined in 17 U.S.C. § 119(d)(10), to any business, or to any other customer for other than "private home viewing." EchoStar shall also strictly comply with the monthly reporting requirements of 17 U.S.C. § 119(a)(2)(C).

2. *Steps to ensure compliance.* To ensure compliance with this Order, EchoStar shall not provide ABC, CBS, Fox, or NBC network programming by satellite to:

a. Any customer predicted by the Longley-Rice propagation model, run for purposes of this Order in the manner specified in Appendix 1, to be served by an ABC, CBS, Fox, or NBC primary network station, without first either (i) obtaining the signed written consent of the

affected station(s), as described in Paragraph 3 below, or (ii) providing the affected station(s) with copies of signal intensity tests showing that the household cannot receive an over-the-air signal of grade B intensity as defined by the FCC from any station of the relevant network, as described in Paragraph 4 below; or

b. Any business or other non-household entity.

2A. *Antenna height in running Longley-Rice.* In running the Longley-Rice propagation model for purposes of this Order, the receiving antenna shall be assumed to be at 30 feet if the subscriber resides in a two-story or higher home, or at 20 feet if the subscriber resides in a one-story home. Under the following circumstances, EchoStar may (absent testing or waiver(s)) provide service to a subscriber who is predicted by the Longley-Rice propagation model for purposes of this Order to be ineligible for ABC, CBS, Fox, or NBC programming with an assumed 30-foot receiving antenna, but who is predicted to be eligible with an assumed 20-foot receiving antenna ("20-foot-predicted-eligible subscriber"):

(i) for any such existing subscriber as of the date of this Order to whom it provides continued service beyond the date on which such service otherwise would be required to be terminated under this Order, EchoStar provides plaintiffs, no later than March 1, 2000, with a copy of a signed written statement from the subscriber that the building in which he or she receives EchoStar is a one-story residence;

(ii) for any such subscriber who signs up for EchoStar on or after the date of this Order, EchoStar provides plaintiffs, no later than the 15th day of the

second calendar month after the customer signs up for EchoStar, with a copy of a signed written statement from the subscriber that the building in which he or she receives EchoStar is a one-story residence. For example, if EchoStar initiates service to such a subscriber during March, 2000, it shall provide plaintiffs with the required signed written statement by May 15, 2001.

EchoStar may not (absent testing or waiver(s)) provide service to any household that would not be predicted to be eligible if its antenna were assumed to be at 30 feet unless EchoStar satisfies the conditions set forth above, provided that it shall not be a violation of this Order to provide service to a 20-foot-predicted-eligible subscriber, up to the time when a signed written statement must be served on plaintiffs, based on a reasonable, good faith acceptance of a subscriber's representation about building height. If EchoStar terminates a subscriber for lack of a signed written statement about building height, it may not re-sign up that customer for the terminated service until it has provided such a statement to plaintiffs.

Any statement provided pursuant to this provision may be rebutted by competent evidence. If EchoStar wishes to rely on documentation other than signed written statements from customers to establish the height of a customer's home, the parties shall confer in good faith about the proposal. If the parties are unable to reach agreement, the Court may modify this provision for good cause shown.

3. *Service by consent of affected stations.* If EchoStar wishes to provide ABC, CBS, Fox, or NBC programming

to a particular household by signed written consent, it must obtain and maintain records of such consent from each affected station. With respect to a particular household, the term "affected station" shall mean any television station of the relevant network that is predicted by the Longley-Rice model, run for purposes of this Order in the manner described in Appendix 1, to serve that household. If EchoStar contends that it is serving a particular subscriber though [sic] signed written consent of the affected stations, it shall so indicate on any subscriber list provided to any plaintiff pursuant to Section 119, and provide any affected station on request, within 10 business days, with a copy of such signed written consent.

4. *Signal intensity test procedures.* Before conducting any signal intensity test for purposes of establishing that a household cannot receive an over-the-air signal of grade B intensity with a conventional outdoor rooftop receiving antenna, EchoStar shall give each affected station (as defined in ¶ 3) at least 15 business days written advance notice of its intention to conduct the test and of the time and place at which the test will be conducted, along with any instructions, chart, form, or other documents that EchoStar or its designee intends to use in carrying out or recording such test. For purposes of determining eligibility under this paragraph, the signal of each affected station must be tested. Any signal intensity test carried out for purposes of determining eligibility to receive ABC, CBS, Fox, or NBC programming by satellite shall be conducted in accordance with the procedures set forth in 47 C.F.R. § 73.686(d), as published in Appendix B of the FCC Report and Order, *In the Matter of Satellite*

Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, FCC 99-14 (released Feb. 2, 1999). The "loser pays" rules set forth in 17 U.S.C. § 119(a)(9) shall be applicable with respect to the reasonable costs of tests conducted pursuant to the Preliminary Injunction. EchoStar shall not provide ABC, CBS, Fox, or NBC network programming to any subscriber otherwise ineligible to receive such programming under this Order based on any signal intensity test that has not been conducted in accordance with the requirements set forth in this Paragraph. EchoStar shall not represent to any person that any signal intensity test conducted other than in compliance with this Paragraph enables it to provide network programming to any person.

5. *Accurate data required.* EchoStar shall make all determinations of eligibility to receive ABC, CBS, Fox, and NBC programming based on accurate subscriber names and addresses and shall not accept subscriber names or addresses, statements concerning household height, or other information that it has reason to believe have been falsified to make the customer appear to be eligible to receive distant network programming. The Longley-Rice predictions described in Paragraph 2(a) above shall be created based on accurate information about the location, height, and power of the transmitters of ABC, CBS, Fox, and NBC network stations, including both main transmitters and translators or terrestrial satellite stations that retransmit the programming of those stations.

6. *Testing by stations.* With respect to households predicted by the Longley-Rice model (run in the manner specified in Appendix 1) as not likely to receive a signal

of grade B intensity: if an ABC, CBS, Fox, or NBC network station, after giving 15 business days written advance notice to EchoStar of its intention to conduct a test and of the time and place at which the test will [sic] conducted, conducts a signal strength test in the manner described in Paragraph 4 above showing that the household can receive a signal of grade B intensity, EchoStar shall terminate service of the pertinent network to the affected subscriber within 60 days of receiving the test results.

7. *Termination of service to existing subscribers predicted to receive Grade A signals.* With respect to any EchoStar subscriber to whom EchoStar delivered ABC, CBS, Fox, or NBC network programming by satellite as of the date of this Order and who is predicted by the Longley-Rice model set forth in Appendix 1 to receive a signal of at least Grade A intensity from at least one station of the relevant network, EchoStar shall come into compliance with Paragraphs 1 and 2 above no later than February 15, 1999. The same date shall be applicable to any subscriber signed up by EchoStar after October 31, 1999 who is predicted by the Longley-Rice model set forth in Appendix 1 to receive a signal of at lease Grade B intensity from at least one station of the relevant network.

8. *Service to pre-October 31, 1999 below-Grade-A subscribers.* Notwithstanding the foregoing provisions concerning service to subscribers who can receive a signal of Grade B intensity from a local network station, through December 31, 2004, EchoStar shall not be prohibited by ¶ 2(a) of this Order from delivering a network station affiliated with a particular network to a household that received a station affiliated with that network by satellite

from EchoStar as of October 30, 1999, and that is not predicted by the Longley-Rice model set forth in Appendix 1 to receive a signal of Grade A intensity from any station affiliated with that network.

9. *Documentation of below-Grade-A subscribers.* EchoStar shall provide ABC, CBS, Fox, and NBC, no later than January 31, 2000, with a list, in standard electronic form, of the names and street addresses, including county and Zip Code, of (i) each subscriber that EchoStar contends is eligible to receive network stations of that network pursuant to ¶ 8. The lists shall include the predicted dBu levels for each affected station according to the Longley-Rice model set forth in Appendix 1. On monthly subscriber lists provided to the Networks in the future pursuant to 17 U.S.C. § 119(a)(2)(C), EchoStar shall list separately any subscribers that it contends fall within ¶ 8 hereof.

10. *Provision of post-turnoff subscriber lists.* For purposes of monitoring EchoStar's compliance with this Preliminary Injunction, EchoStar shall provide ABC, CBS, Fox, and NBC no later than March 31, 2000, with a list, in standard electronic format, of the names and street addresses, including county and zip code, along with predicted dBu levels using the Longley-Rice model set forth in Appendix 1, of each subscriber to whom EchoStar provided programming of that network as of February 16, 2000. For any subscriber that EchoStar served as of March 2, 2000, pursuant to ¶ 4 (consent of affected stations) or ¶ 5 (signal intensity testing), or ¶ 8 (pre-October 31, 1999 below-Grade-A subscribers), EchoStar shall so indicate on the list and thereafter provide necessary documentation within 10 days after receiving a request by an

affected station. These lists shall be used for the sole purpose of determining EchoStar's compliance with this Preliminary Injunction and/or determining whether to grant consent to delivery of network programming to the listed subscribers.

11. *Compliance reporting.* EchoStar shall file and serve on Plaintiffs an initial report, within 15 days of the entry of this Preliminary Injunction, setting forth in detail the manner in which EchoStar is complying with this Preliminary Injunction. EchoStar shall file and serve similar compliance reports, containing updated information, on the first day of every other month thereafter.

12. *Limit to two stations per network.* Pursuant to 17 U.S.C. § 119(a)(2)(B)(i), EchoStar shall not deliver in a single day to any subscriber the signals of more than two distant network stations (*i.e.*, stations not licensed to the local market in which the subscriber is located) affiliated with a single television network.

13. *Local-to-local retransmissions.* Nothing in this Preliminary Injunction shall prevent EchoStar from engaging in otherwise lawful secondary transmissions of a network station to customers in that station's local market (as defined in 17 U.S.C. § 122(j)). EchoStar shall provide each network (separately as to each station carried) with accurate subscriber names and addresses pursuant to 17 U.S.C. § 122(b) of all subscribers receiving local-to-local retransmissions of network stations affiliated with that network, and shall not accept subscriber names or addresses that it has reason to believe have been falsified to make the customer appear eligible to receive network programming by satellite on a local-to-local basis.

14. *RV and commercial truck exception.* Notwithstanding any other provision of this Final Judgment and Permanent Injunction, EchoStar shall not be prohibited by this Order from retransmitting an ABC, CBS, Fox, or NBC network station to a recreational vehicle or commercial truck (as defined in 17 U.S.C. § 119(d)(11)) as to which EchoStar has strictly complied with the requirements of Section 119(d)(11). EchoStar shall not retransmit a network station to any person based on information or documentation that it has reason to believe has been falsified to make the customer appear eligible to receive network programming pursuant to Section 119(d)(11).

15. *Persons bound.* This Preliminary Injunction shall be binding on each of the EchoStar defendants, their officers, agents, servants, employees, and attorneys, and on all those in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

16. *Bond.* Within five business days of receipt of this Order, plaintiffs shall post an injunction bond of $15,000.

DONE and ORDERED in Chambers, Miami, Florida, this 28 day of September, 2000.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: David M. Rogero, Esq.
Thomas P. Olson, Esq.
Cynthia A. Ricketts, Esq.
T. Wade Welch, Esq.
Kenneth M. Myers, Esq.
Mark Nadeau, Esq.
Natacha Steimer, Esq.

APPENDIX 1

Specifications for Running Longley-Rice Propagation Model

The following procedures shall be used when running the Longley-Rice propagation model for purposes of this Preliminary Injunction:

1. Version 1.2.2 of the Longley-Rice model shall be used in the manner described herein for all predictive purposes under this Preliminary Injunction. For purposes of determining whether a household is predicted to receive a signal of Grade B intensity from an ABC, CBS, Fox, or NBC station, the "Grade B intensity" values to be applied are 47 dBu for low-VHF channels, 56 dBu for high-VHF channels, and 64 dBu for UHF channels.

2. In determining whether a particular household is predicted to receive a signal of Grade B intensity from an ABC, CBS, Fox, or NBC station, the time variability factor and the confidence variability factor shall both be set at 50%.

3. The model shall be run in individual mode, making an input for "location variability" unnecessary.

4. Terrain elevation shall be considered every 1/10 of a kilometer. Locations both within and beyond a station's FCC-predicted Grade B contour shall be examined.

5. Receiving antenna height shall be assumed to be 20 feet above ground for one-story residences and 30 feet above ground for residences taller than one story.

6. Each household shall be examined to determine all ABC, CBS, Fox, or NBC primary network stations that are predicted to deliver a signal of Grade B intensity to that household, and to determine the predicted signal strength of each such station at that household. The analysis shall include both the main transmitter of each such ABC, CBS, Fox, and NBC station and any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming of such ABC, CBS, Fox, or NBC station.

7. Each household that is predicted to receive a signal of Grade B intensity from a particular ABC, CBS, Fox, or NBC station shall be examined to determine whether the household is predicted to receive, 10% or more of the time, co-channel, adjacent-channel, or taboo channel interference with respect to that station (*i.e.*, with desired-to-undesired ratios less than those set forth in Tables 5A and 5B of FCC Office of Engineering & Technology Bulletin No. 69, as published by the FCC on July 2, 1997) ("OET Bulletin 69") from another terrestrial television broadcast station currently in operation. In predicting interference, the confidence input shall be set at 50%. For purposes of interference analysis, the receiving antenna pattern (including but not limited to the

front-to-back ratio in Table 6 of OET Bulletin 69) shall be that specified in OET Bulletin 69, except that the receiving antenna height shall be the same (20 feet or 30 feet) used in predicting the strength of the desired station pursuant to ¶¶ 5-6 of this Appendix. In addition, for purposes of interference analysis, the maximum distances in Table 7 and vertical pattern data in Table 8 of OET Bulletin No. 69 shall be applied.

8. Any household (a) predicted to receive a signal of at least Grade B intensity from an ABC, CBS, Fox, or NBC station (using the methods set forth in ¶¶ 1-6) and (b) not predicted to receive co-channel, adjacent channel, or taboo channel interference with respect to that station (using the methods set forth in ¶¶ 1, 3-5, 7) shall be considered to be predicted to be served by that station. A station shall not be considered to be predicted to serve a particular household if either of the conditions in the above sentence is not met. A household shall be classified as ineligible to receive ABC, CBS, Fox, or NBC network service from EchoStar if it is predicted to be served by at least one station of the relevant network.

9. Where error codes appear, they shall be ignored and the predicted value accepted for purposes of Longley-Rice predictions.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 98-2651-CIV (Nesbitt/Johnson)
Case No. 99-06382-CIV (Nesbitt/Johnson)
(Consolidated)

CBS Broadcasting Inc., *et al.*,
Plaintiffs,

v.

EchoStar Communications Corporation, *et al.*,
Defendants.

EchoStar Communications Corporation, *et al.*,
Plaintiffs

v.

CBS Broadcasting Inc., *et al.*,
Defendants

AMENDED PRELIMINARY INJUNCTION

(Filed Oct. 3, 2000)

This case comes before the Court on the Motion for Preliminary Injunction filed on December 2, 1998 by CBS Broadcasting Inc., Fox Broadcasting Co., ABC, Inc., National Broadcasting Company, Inc., CBS Television Network Affiliates Association, FBC Television Affiliates Association, ABC Television Affiliates Association, and NBC Television Affiliates ("plaintiffs"). On consideration of plaintiffs' motion and the supporting factual materials

filed therewith, the Opposition filed by the EchoStar defendants (EchoStar Communications Corporation d/b/a DISH Network, EchoStar Satellite Corporation, Satellite Communications Operating Corporation, and Direct Sat Corporation) (collectively "EchoStar"), the Reply filed by plaintiffs, the hearing held by the Court on September 21, 1999, the supplemental briefs and factual materials filed by the parties, and the entire record herein, and for the reasons set forth in this Court's Order filed on September 29, 2000, it is hereby

ORDERED and ADJUDGED

that plaintiffs' motion is **GRANTED.** It is further **ORDERED AND ADJUDGED** as follows:

1. *Compliance with Copyright Act.* Pending resolution of this matter on the merits, EchoStar shall not deliver ABC, CBS, Fox, or NBC television network programming to any customer that does not live in an "unserved household" as defined in 17 U.S.C. § 119(d)(10), to any business, or to any other customer for other than "private home viewing." EchoStar shall also strictly comply with the monthly reporting requirements of 17 U.S.C. § 119(a)(2)(C).

2. *Steps to ensure compliance.* To ensure compliance with this Order, EchoStar shall not provide ABC, CBS, Fox, or NBC network programming by satellite to:

a. Any customer predicted by the Longley-Rice propagation model, run for purposes of this Order in the manner specified in Appendix 1, to be served by an ABC, CBS, Fox, or NBC primary network station, without first either (i) obtaining the signed written consent of the

affected station(s), as described in Paragraph 3 below, or (ii) providing the affected station(s) with copies of signal intensity tests showing that the household cannot receive an over-the-air signal of grade B intensity as defined by the FCC from any station of the relevant network, as described in Paragraph 4 below; or

b. Any business or other non-household entity.

2A. *Antenna height in running Longley-Rice.* In running the Longley-Rice propagation model for purposes of this Order, the receiving antenna shall be assumed to be at 30 feet if the subscriber resides in a two-story or higher home, or at 20 feet if the subscriber resides in a one-story home. Under the following circumstances, EchoStar may (absent testing or waiver(s)) provide service to a subscriber who is predicted by the Longley-Rice propagation model for purposes of this Order to be ineligible for ABC, CBS, Fox, or NBC programming with an assumed 30-foot receiving antenna, but who is predicted to be eligible with an assumed 20-foot receiving antenna ("20-foot-predicted-eligible subscriber"):

(i) for any such existing subscriber as of the date of this Order to whom it provides continued service beyond the date on which such service otherwise would be required to be terminated under this Order, EchoStar provides plaintiffs, no later than December 15, 2000, with a copy of a signed written statement from the subscriber that the building in which he or she receives EchoStar is a one-story residence;

(ii) for any such subscriber who signs up for EchoStar on or after the date of this Order, EchoStar provides plaintiffs, no later than the 15th day of the

second calendar month after the customer signs up for EchoStar, with a copy of a signed written statement from the subscriber that the building in which he or she receives EchoStar is a one-story residence. For example, if EchoStar initiates service to such a subscriber during December, 2000, it shall provide plaintiffs with the required signed written statement by February 15, 2001.

EchoStar may not (absent testing or waiver(s)) provide service to any household that would not be predicted to be eligible if its antenna were assumed to be at 30 feet unless EchoStar satisfies the conditions set forth above, provided that it shall not be a violation of this Order to provide service to a 20-foot-predicted-eligible subscriber, up to the time when a signed written statement must be served on plaintiffs, based on a reasonable, good faith acceptance of a subscriber's representation about building height. If EchoStar terminates a subscriber for lack of a signed written statement about building height, it may not re-sign up that customer for the terminated service until it has provided such a statement to plaintiffs.

Any statement provided pursuant to this provision may be rebutted by competent evidence. If Echo Star wishes to rely on documentation other than signed written statements from customers to establish the height of a customer's home, the parties shall confer in good faith about the proposal. If the parties are unable to reach agreement, the Court may modify this provision for good cause shown.

3. *Service by consent of affected stations.* If EchoStar wishes to provide ABC, CBS, Fox, or NBC programming

to a particular household by signed written consent, it must obtain and maintain records of such consent from each affected station. With respect to a particular household, the term "affected station" shall mean any television station of the relevant network that is predicted by the Longley-Rice model, run for purposes of this Order in the manner described in Appendix 1, to serve that household. If EchoStar contends that it is serving a particular subscriber though [sic] signed written consent of the affected stations, it shall so indicate on any subscriber list provided to any plaintiff pursuant to Section 119, and provide any affected station on request, within 10 business days, with a copy of such signed written consent.

4. *Signal intensity test procedures.* Before conducting any signal intensity test for purposes of establishing that a household cannot receive an over-the-air signal of grade B intensity with a conventional outdoor rooftop receiving antenna, EchoStar shall give each affected station (as defined in ¶ 3) at least 15 business days written advance notice of its intention to conduct the test and of the time and place at which the test will be conducted, along with any instructions, chart, form, or other documents that EchoStar or its designee intends to use in carrying out or recording such test. For purposes of determining eligibility under this paragraph, the signal of each affected station must be tested. Any signal intensity test carried out for purposes of determining eligibility to receive ABC, CBS, Fox, or NBC programming by satellite shall be conducted in accordance with the procedures set forth in 47 C.F.R. § 73.686(d), as published in Appendix B of the FCC Report and Order, *In the Matter of Satellite*

Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, FCC 99-14 (released Feb. 2, 1999). The "loser pays" rules set forth in 17 U.S.C. § 119(a)(9) shall be applicable with respect to the reasonable costs of tests conducted pursuant to the Preliminary Injunction. EchoStar shall not provide ABC, CBS, Fox, or NBC network programming to any subscriber otherwise ineligible to receive such programming under this Order based on any signal intensity test that has not been conducted in accordance with the requirements set forth in this Paragraph. EchoStar shall not represent to any person that any signal intensity test conducted other than in compliance with this Paragraph enables it to provide network programming to any person.

5. *Accurate data required.* EchoStar shall make all determinations of eligibility to receive ABC, CBS, Fox, and NBC programming based on accurate subscriber names and addresses and shall not accept subscriber names or addresses, statements concerning household height, or other information that it has reason to believe have been falsified to make the customer appear to be eligible to receive distant network programming. The Longley-Rice predictions described in Paragraph 2(a) above shall be created based on accurate information about the location, height, and power of the transmitters of ABC, CBS, Fox, and NBC network stations, including both main transmitters and translators or terrestrial satellite stations that retransmit the programming of those stations.

6. *Testing by stations.* With respect to households predicted by the Longley-Rice model (run in the manner specified in Appendix 1) as not likely to receive a signal

of grade B intensity: if an ABC, CBS, Fox, or NBC network station, after giving 15 business days written advance notice to EchoStar of its intention to conduct a test and of the time and place at which the test will [sic] conducted, conducts a signal strength test in the manner described in Paragraph 4 above showing that the household can receive a signal of grade B intensity, EchoStar shall terminate service of the pertinent network to the affected subscriber within 60 days of receiving the test results.

7. *Termination of service to existing subscribers predicted to receive Grade A signals.* With respect to any EchoStar subscriber to whom EchoStar delivered ABC, CBS, Fox, or NBC network programming by satellite as of the date of this Order and who is predicted by the Longley-Rice model set forth in Appendix 1 to receive a signal of at least Grade A intensity from at least one station of the relevant network, EchoStar shall come into compliance with Paragraphs 1 and 2 above no later than December 1, 2000. The same date shall be applicable to any subscriber signed up by EchoStar after October 31, 1999 who is predicted by the Longley-Rice model set forth in Appendix 1 to receive a signal of at lease Grade B intensity from at least one station of the relevant network.

8. *Service to pre-October 31, 1999 below-Grade-A subscribers.* Notwithstanding the foregoing provisions concerning service to subscribers who can receive a signal of Grade B intensity from a local network station, through December 31, 2004, EchoStar shall not be prohibited by ¶ 2(a) of this Order from delivering a network station affiliated with a particular network to a household that received a station affiliated with that network by satellite

from EchoStar as of October 30, 1999, and that is not predicted by the Longley-Rice model set forth in Appendix 1 to receive a signal of Grade A intensity from any station affiliated with that network.

9. *Documentation of below-Grade-A subscribers.* EchoStar shall provide ABC, CBS, Fox, and NBC, no later than November 15, 2000, with a list, in standard electronic form, of the names and street addresses, including county and Zip Code, of (i) each subscriber that EchoStar contends is eligible to receive network stations of that network pursuant to ¶ 8. The lists shall include the predicted dBu levels for each affected station according to the Longley-Rice model set forth in Appendix 1. On monthly subscriber lists provided to the Networks in the future pursuant to 17 U.S.C. § 119(a)(2)(C), EchoStar shall list separately any subscribers that it contends fall within ¶ 8 hereof.

10. *Provision of post-turnoff subscriber lists.* For purposes of monitoring EchoStar's compliance with this Preliminary Injunction, EchoStar shall provide ABC, CBS, Fox, and NBC no later than January 15, 2001, with a list, in standard electronic format, of the names and street addresses, including county and zip code, along with predicted dBu levels using the Longley-Rice model set forth in Appendix 1, of each subscriber to whom EchoStar provided programming of that network as of December 2, 2000. For any subscriber that EchoStar served as of December 2, 2000, pursuant to ¶ 4 (consent of affected stations) or ¶ 5 (signal intensity testing), or ¶ 8 (pre-October 31, 1999 below-Grade-A subscribers), EchoStar shall so indicate on the list and thereafter provide necessary documentation within 10 days after receiving a

request by an affected station. These lists shall be used for the sole purpose of determining EchoStar's compliance with this Preliminary Injunction and/or determining whether to grant consent to delivery of network programming to the listed subscribers.

11. *Compliance reporting.* EchoStar shall file and serve on Plaintiffs an initial report, within 15 days of the entry of this Preliminary Injunction, setting forth in detail the manner in which EchoStar is complying with this Preliminary Injunction. EchoStar shall file and serve similar compliance reports, containing updated information, on the first day of every other month thereafter.

12. *Limit to two stations per network.* Pursuant to 17 U.S.C. § 119(a)(2)(B)(i), EchoStar shall not deliver in a single day to any subscriber the signals of more than two distant network stations (*i.e.*, stations not licensed to the local market in which the subscriber is located) affiliated with a single television network.

13. *Local-to-local retransmissions.* Nothing in this Preliminary Injunction shall prevent EchoStar from engaging in otherwise lawful secondary transmissions of a network station to customers in that station's local market (as defined in 17 U.S.C. § 122(j)). EchoStar shall provide each network (separately as to each station carried) with accurate subscriber names and addresses pursuant to 17 U.S.C. § 122(b) of all subscribers receiving local-to-local retransmissions of network stations affiliated with that network, and shall not accept subscriber names or addresses that it has reason to believe have been falsified to make the customer appear eligible to receive network programming by satellite on a local-to-local basis.

14. *RV and commercial truck exception.* Notwithstanding any other provision of this Final Judgment and Permanent Injunction, EchoStar shall not be prohibited by this Order from retransmitting an ABC, CBS, Fox, or NBC network station to a recreational vehicle or commercial truck (as defined in 17 U.S.C. § 119(d)(11)) as to which EchoStar has strictly complied with the requirements of Section 119(d)(11). EchoStar shall not retransmit a network station to any person based on information or documentation that it has reason to believe has been falsified to make the customer appear eligible to receive network programming pursuant to Section 119(d)(11).

15. *Persons bound.* This Preliminary Injunction shall be binding on each of the EchoStar defendants, their officers, agents, servants, employees, and attorneys, and on all those in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

16. *Bond.* Within five business days of receipt of this Order, plaintiffs shall post an injunction bond of $15,000.

DONE and ORDERED in Chambers, Miami, Florida, this 2 day of October, 2000.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: David M. Rogero, Esq.
Thomas P. Olson, Esq.
Cynthia A. Ricketts, Esq.
T. Wade Welch, Esq.
Kenneth M. Myers, Esq.
Mark Nadeau, Esq.
Natacha Steimer, Esq.

APPENDIX 1

Specifications for Running Longley-Rice Propagation Model

The following procedures shall be used when running the Longley-Rice propagation model for purposes of this Preliminary Injunction:

1. Version 1.2.2 of the Longley-Rice model shall be used in the manner described herein for all predictive purposes under this Preliminary Injunction. For purposes of determining whether a household is predicted to receive a signal of Grade B intensity from an ABC, CBS, Fox, or NBC station, the "Grade B intensity" values to be applied are 47 dBu for low-VHF channels, 56 dBu for high-VHF channels, and 64 dBu for UHF channels.

2. In determining whether a particular household is predicted to receive a signal of Grade B intensity from an ABC, CBS, Fox, or NBC station, the time variability factor and the confidence variability factor shall both be set at 50%.

3. The model shall be run in individual mode, making an input for "location variability" unnecessary.

4. Terrain elevation shall be considered every 1/10 of a kilometer. Locations both within and beyond a station's FCC-predicted Grade B contour shall be examined.

5. Receiving antenna height shall be assumed to be 20 feet above ground for one-story residences and 30 feet above ground for residences taller than one story.

6. Each household shall be examined to determine all ABC, CBS, Fox, or NBC primary network stations that are predicted to deliver a signal of Grade B intensity to that household, and to determine the predicted signal strength of each such station at that household. The analysis shall include both the main transmitter of each such ABC, CBS, Fox, and NBC station and any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming of such ABC, CBS, Fox, or NBC station.

7. Each household that is predicted to receive a signal of Grade B intensity from a particular ABC, CBS, Fox, or NBC station shall be examined to determine whether the household is predicted to receive, 10% or more of the time, co-channel, adjacent-channel, or taboo channel interference with respect to that station (*i.e.*, with desired-to-undesired ratios less than those set forth in Tables 5A and 5B of FCC Office of Engineering & Technology Bulletin No. 69, as published by the FCC on July 2, 1997) ("OET Bulletin 69") from another terrestrial television broadcast station currently in operation. In predicting interference, the confidence input shall be set at 50%. For purposes of interference analysis, the receiving antenna pattern (including but not limited to the

front-to-back ratio in Table 6 of OET Bulletin 69) shall be that specified in OET Bulletin 69, except that the receiving antenna height shall be the same (20 feet or 30 feet) used in predicting the strength of the desired station pursuant to ¶¶ 5-6 of this Appendix. In addition, for purposes of interference analysis, the maximum distances in Table 7 and vertical pattern data in Table 8 of OET Bulletin No. 69 shall be applied.

8. Any household (a) predicted to receive a signal of at least Grade B intensity from an ABC, CBS, Fox, or NBC station (using the methods set forth in ¶¶ 1-6) and (b) not predicted to receive co-channel, adjacent channel, or taboo channel interference with respect to that station (using the methods set forth in ¶¶ 1, 3-5, 7) shall be considered to be predicted to be served by that station. A station shall not be considered to be predicted to serve a particular household if either of the conditions in the above sentence is not met. A household shall be classified as ineligible to receive ABC, CBS, Fox, or NBC network service from EchoStar if it is predicted to be served by at least one station of the relevant network.

9. Where error codes appear, they shall be ignored and the predicted value accepted for purposes of Longley-Rice predictions.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CBS BROADCASTING, INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS CORPORATION, et al.,

Defendants.

CASE NO. 98-2651-CIV-NESBITT

ORDER

(Filed Oct. 26, 2000)

ECHOSTAR COMMUNICATIONS CORPORATION, et al.,

Plaintiffs,

vs.

CBS BROADCASTING, INC., et al.,

Defendants.

CASE NO. 99-6382-CIV-NESBITT

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This cause comes before the Court upon EchoStar's Emergency and Expedited Motion to Stay the Court's Nationwide Preliminary Injunction Pending Appeal, filed October 6, 2000 (D.E. #184); EchoStar's Motion for Expedited Ruling, filed October 6, 2000 (D.E. #185); and EchoStar's Supplemental Emergency Motion to Stay in Light

of Court's Amended Preliminary Injunction Order and Motion to Amend Ministerial Compliance Dates in Amended Preliminary Injunction Order, filed October 10, 2000 (D.E. #187).

EchoStar requests that the Court reconsider or amend certain aspects of the Amended Preliminary Injunction. EchoStar also requests that, pursuant to Federal Rule of Civil Procedure 62(c), the Court stay execution of the Amended Preliminary Injunction pending appeal or, in the alternative, for a period of thirty days.

The factors which the Court must consider in its decision whether to grant a stay are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987). Because these factors are so similar to those which the Court analyzed before it issued the Amended Preliminary Injunction, *see* Order Granting Motion for Preliminary Injunction, at 3; *Tefel v. Reno*, 180 F.3d 1286, 1295 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2657 (2000), EchoStar effectively requests that the Court reconsider its decision regarding some of those factors.

Among its assertions, EchoStar contends that it is likely to succeed on the merits of its appeal because the Court "imposed upon EchoStar a two-year old, and outdated, ILLR model." EchoStar's Memorandum of Law in Support of its Emergency Motion, D.E. #184, at 3. Specifically, EchoStar points out that in a May 22, 2000 Report,

the FCC "prescribe[d] an improved point-to-point predictive model for determining the ability of individual locations to receive an over-the-air television broadcast signal of a specific intensity through the use of a conventional, outdoor rooftop receiving antenna." FCC Report 00-185, D.E. #184, Exh. 1, at 2. The network parties agree that in the May 22, 2000, Report, the FCC prescribed UHF "clutter" adjustments.

Notably, in the four months and one week between May 22, 2000, when the FCC issued its report, and September 28, 2000, when the Court signed the Order granting the network parties' Motion for Preliminary Injunction, EchoStar did not inform the Court that the FCC had issued a Report regarding an amended ILLR predictive model. EchoStar therefore failed to apprize the Court of any authority which would have supported the Court's entry of a preliminary injunction which incorporated an ILLR model different from that which the Court used. Additionally, before the Court entered the Preliminary Injunction, EchoStar did not object on this ground to the ILLR model which the network parties incorporated in their proposed preliminary injunction.

Instead, EchoStar, for reasons which it has not revealed, waited until after the Court entered the Preliminary Injunction to apprize the Court of the FCC Order, and to suggest that the ILLR model which the Court used and which the network parties included in their proposed preliminary injunction was "outdated." Of course, EchoStar must raise contentions regarding pending motions and inform the Court of available authority which is relevant to pending motions *before* the Court rules on those motions. *Cf. Mathis v. New York Life Ins. Co.*, 133 F.3d

546, 548 (7th Cir. 1997) (" 'A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point. We will not do his research for him.' ") (quoting *Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990)); *Franklin v. United States*, 992 F.2d 1492, 1503 (10th Cir. 1993) ("[T]here is no legal argument or authority provided. . . . This omission alone would warrant affirmance. . . . "); *Primas v. City of Oklahoma City*, 958 F.2d 1506, 1511 (10th Cir. 1992) ("Mr. Primas has a duty to provide authority for any argument he raises."); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Because the FCC Report was available to EchoStar for more than four months before the Court entered the Preliminary Injunction, the Court will not reconsider its decision based on EchoStar's untimely submission of that Report, *cf. Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) ("A motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision. . . . "), and the Court does not find that EchoStar is likely to succeed on the merits of this issue.

The Court therefore will not amend the Amended Preliminary Injunction to include the UHF "clutter" adjustments which the FCC prescribed in its May 22, 2000, Report,[1] or stay execution of the Amended Preliminary Injunction on this ground. However, the Court will

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[1] EchoStar has not directed the Court to any other relevant changes to the ILLR model which the FCC prescribed in its May 22 Report.

consider EchoStar's or the network parties' timely assertions regarding the FCC's May 22, 2000, Report at future stages of these proceedings, including trial.

Because of a clerical error, in the original Preliminary Injunction (D.E. #182), the Court directed EchoStar to meet certain deadlines which had already passed. The Court therefore entered an Amended Preliminary Injunction (D.E. #184), which was filed on October 4, 2000.

Unfortunately, EchoStar did not receive the Amended Preliminary Injunction until after it filed its Emergency and Expedited Motion. In that Motion, EchoStar objected to the Court's inclusion of compliance dates which had already passed in the original Preliminary Injunction.

In its Supplemental Emergency Motion (D.E. #187), EchoStar recognizes that the Court amended the compliance dates. However, EchoStar contends that the modified compliance dates "are unworkable. . . . " D.E. #187, at 3. The network parties represent that they will agree to revised compliance dates only if EchoStar agrees to certain other provisions contained in the network parties' proposed Order Concerning Amended Preliminary Injunction.

The Court finds that EchoStar's request for an extension of certain compliance dates is reasonable. The Court therefore will amend those compliance dates.

In the Amended Preliminary Injunction, the Court requires a household seeking waivers to receive "signed written consent" from affected television stations. Amended Prelim. Inj., at 2 ¶ 2a(i), 4-5 ¶ 3. EchoStar points out, however, that the Satellite Home Viewer Act

only requires that a subscriber receive "written" consent, not "signed written" consent. 47 U.S.C. § 339(c)(2). EchoStar asks the Court to obviate the requirement that waivers be signed so that Decisionmark may electronically process unsigned waivers.

The network parties do not dispute that the SHVA does not require written waivers to be signed. The network parties, however, are concerned that deleting the requirement that waivers be signed will result in "countless disputes about unsigned waivers." Plaintiff's Opposition, D.E. #193, at 17 n.25. The network parties therefore request that for any household which has obtained waivers, the Court require EchoStar to obtain a sworn declaration from one of Decisionmark's officers which verifies that the subscriber obtained the appropriate consent. D.E. #193, at 17 n.25; Network parties' proposed Order Concerning Amended Preliminary Injunction, at 3 ¶ 5.

The Court recognizes that disputes may arise regarding whether subscribers obtained the appropriate consent. However, the Court will amend the Amended Preliminary Injunction to track the language of the SHVA, without requiring EchoStar to obtain sworn declarations regarding each waiver Decisionmark processes.

EchoStar has raised several other contentions, most of which the Court addressed in its Order Granting Motion for Preliminary Injunction (D.E. #181), and none of which the court concludes is meritorious.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. EchoStar's Emergency and Expedited Motion to Stay the Court's Nationwide Preliminary Injunction Pending Appeal, filed October 6, 2000 (D.E. **#184** in case no. 98-2651-CIV-NESBITT), *and* EchoStar's Supplemental Emergency Motion to Stay in Light of Court's Amended Preliminary Injunction Order and Motion to Amend Ministerial Compliance Dates in Amended Preliminary Injunction Order, filed October 10, 2000 (D.E. **#187**), are **GRANTED in part and DENIED in part.** EchoStar's Motions are GRANTED only to the extent that the Court amends the Amended Preliminary Injunction as outlined below in paragraph 3. As to all other issues, including EchoStar's request for a stay of the Amended Preliminary Injunction pending appeal, EchoStar's Motions are DENIED.

2. EchoStar's Motion for Expedited Ruling, filed October 6, 2000 (D.E. **#185**), is **DENIED** as moot.

3. The Amended Preliminary Injunction (D.E. #183) is amended as follows:

a. The word "signed" is removed from page two, paragraph 2a(i), and from pages four to five, paragraph 3, where it appears three times.

b. On page two, paragraph 2A(i), "December 15, 2000" is changed to "March 1, 2001".

c. On page seven, paragraph 7, "December 1, 2000" is changed to "February 15, 2001".

d. On page seven, paragraph 9, "November 15, 2000" is changed to "January 31, 2001".

e. On page eight, paragraph 10, "January 15, 2001" is changed to "April 2, 2001".

f. On page eight, paragraph 10, both references to "December 2, 2000" are changed to "February 16, 2001".

DONE and **ORDERED** in Chambers, Miami, Florida, this 25 day of October, 2000.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: David M. Rogero, Esq.
Thomas P. Olson, Esq.
Cynthia A. Ricketts, Esq.
T. Wade Welch, Esq.
Kenneth M. Myers, Esq.
Mark Nadeau, Esq.
Natachā D. Steimer, Esq.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-15378-GG

98-CV-2651

CBS BROADCASTING, INC.,
FOX BROADCASTING COMPANY, *ET AL.*,
Plaintiffs-Appellees,

versus

ECHOSTAR COMMUNICATIONS CORPORATION,
d.b.a. DISH Network,
ECHOSTAR SATELLITE CORPORATION, *ET AL.*,
Defendants-Appellants.

99-CV-6382

ECHOSTAR COMMUNICATION CORPORATION,
a Nevada Corporation,
Plaintiff-Counter-Defendant-Appellant,

ECHOSTAR SATELLITE CORPORATION, a
Colorado Corporation,
SATELLITE COMMUNICATIONS OPERATING
CORPORATION, a Colorado Corporation, *ET AL.*,
Plaintiffs-Appellants,

versus

CBS BROADCASTING INC., a New York Corporation,
FOX BROADCASTING, CO., a California Corporation,
ET AL.,
Defendants-Counter-Claimants-Appellees.

On Appeal from the
United States District Court for the
Southern District of Florida

(Filed Nov. 22, 2000)

BEFORE: ANDERSON, Chief Judge, MARCUS and WILSON, Circuit Judges.

BY THE COURT:

Appellants' emergency motion for stay pending appeal is GRANTED.

On its own motion, the Court EXPEDITES this appeal for consideration by a merits panel upon completion of the briefing schedule. No extensions of the briefing schedule will be granted.

Appellee is directed to serve notice of the filing of its brief upon the District Court Clerk and the District Court Clerk is directed to transmit the record on appeal to this Court immediately upon receipt of Appellees' notice.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-15378-TT

98-CV-2651

CBS BROADCASTING, INC., FOX BROADCASTING COMPANY, ABC, INC., NATIONAL BROADCASTING CO., FBC TELEVISION AFFILIATES ASSOCIATION, et al.,

Plaintiffs-Appellees,

versus

ECHOSTAR COMMUNICATIONS CORPORATION, d.b.a. DISH Network, ECHOSTAR SATELLITE CORPORATION, SATELLITE COMMUNICATIONS OPERATING CORPORATION, DIRECT SAT CORP.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Intervenor.

99-CV-6382

ECHOSTAR COMMUNICATION CORPORATION, a Nevada corporation,

Plaintiff-Counter-Defendant-Appellant,

ECHOSTAR SATELLITE CORPORATION, a Colorado corporation, SATELLITE COMMUNICATIONS OPERATING CORPORATION, a Colorado corporation, DIRECT SAT CORPORATION, a Delaware corporation

Plaintiffs-Appellants,

versus

CBS BROADCASTING INC., a New York corporation, FOX BROADCASTING, CO., a California corporation, NATIONAL BROADCASTING CO., a New York corporation, ABC, INC., a New York corporation,

Defendants-Counter-Claimants-Appellees.

UNITED STATES OF AMERICA,

Intervenor.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Dec. 28, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: ANDERSON, Chief Judge, BIRCH AND WOOD*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Anderson
CHIEF JUDGE

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX H

U.S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Article I, Section 8, Clause 8. Patents and Copyrights

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

APPENDIX I

17 U.S.C. § 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing

(a) Secondary transmissions by satellite carriers.

(1) Superstations and PBS satellite feed. Subject to the provisions of paragraphs (3), (4), and (6) of this subsection and section 114(d), secondary transmissions of a primary transmission made by a superstation or by the Public Broadcasting Service satellite feed and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing. In the case of the Public Broadcasting Service satellite feed, the statutory license shall be effective until January 1, 2002.

(2) Network stations.

(A) In general. Subject to the provisions of subparagraphs (B) and (C) of this paragraph and paragraphs (3), (4), (5), and (6) of this subsection and section 114(d), secondary transmissions of a performance or display of a work embodied in a primary transmission made by a

network station shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals, and the carrier makes a direct or indirect charge for such retransmission service to each subscriber receiving the secondary transmission.

(B) Secondary transmissions to unserved households.

(i) In general. The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions of the signals of no more than two network stations in a single day for each television network to persons who reside in unserved households.

(ii) Accurate determinations of eligibility.

(I) Accurate predictive model. In determining presumptively whether a person resides in an unserved household under subsection (d)(10)(A), a court shall rely on the Individual Location Longley-Rice model set forth by the Federal Communications Commission in Docket No. 98-201, as that model may be amended by the Commission over time under section 339(c)(3) of the Communications Act of 1934 [47 USCS § 339(c)(3)] to increase the accuracy of that model.

(II) Accurate measurements. For purposes of site measurements to determine whether a person resides in an unserved household under subsection

(d)(10)(A), a court shall rely on section 339(c)(4) of the Communications Act of 1934 [47 USCS § 339(c)(4)].

(iii) C-band exemption to unserved households.

(I) In general. The limitations of clause (i) shall not apply to any secondary transmissions by C-band services of network stations that a subscriber to C-band service received before any termination of such secondary transmissions before October 31, 1999.

(II) Definition. In this clause the term "C-band service" means a service that is licensed by the Federal Communications Commission and operates in the Fixed Satellite Service under part 25 of title 47 of the Code of Federal Regulations.

(C) Submission of subscriber lists to networks. A satellite carrier that makes secondary transmissions of a primary transmission made by a network station pursuant to subparagraph (A) shall, 90 days after commencing such secondary transmissions, submit to the network that owns or is affiliated with the network station a list identifying (by name and street address, including county and zip code) all subscribers to which the satellite carrier makes secondary transmissions of that primary transmission. Thereafter, on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by name and street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last submission under this subparagraph. Such subscriber information submitted by

a satellite carrier may be used only for purposes of monitoring compliance by the satellite carrier with this subsection. The submission requirements of this subparagraph shall apply to a satellite carrier only if the network to whom the submissions are to be made places on file with the Register of Copyrights a document identifying the name and address of the person to whom such submissions are to be made. The Register shall maintain for public inspection a file of all such documents.

(3) Noncompliance with reporting and payment requirements. Notwithstanding the provisions of paragraphs (1) and (2), the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b), or has failed to make the submissions to networks required by paragraph (2)(C).

(4) Willful alterations. Notwithstanding the provisions of paragraphs (1) and (2), the secondary transmission to the public by a satellite carrier of a performance or display of a work embodied in a primary transmission made by a superstation or a network station is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station

announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal.

(5) Violation of territorial restrictions on statutory license for network stations.

(A) Individual violations. The willful or repeated secondary transmission by a satellite carrier of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who does not reside in an unserved household is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506 and 509, except that –

(i) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber, and

(ii) any statutory damages shall not exceed $5 for such subscriber for each month during which the violation occurred.

(B) Pattern of violations. If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who do not reside in unserved households, then in addition to the remedies set forth in subparagraph (A) –

(i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out; and

(ii) if the pattern or practice has been carried out on a local or regional basis, the court shall order a permanent injunction barring the secondary transmission, for private home viewing in that locality or region, by the satellite carrier of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out.

(C) Previous subscribers excluded. Subparagraphs (A) and (B) do not apply to secondary transmissions by a satellite carrier to persons who subscribed to receive such secondary transmissions from the satellite carrier or a distributor before November 16, 1988.

(D) Burden of proof. In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is for private home viewing to an unserved household.

(E) Exception. The secondary transmission by a satellite carrier of a performance or display of a work embodied in a primary transmission made by a network

station to subscribers who do not reside in unserved households shall not be an act of infringement if –

(i) the station on May 1, 1991, was retransmitted by a satellite carrier and was not on that date owned or operated by or affiliated with a television network that offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States;

(ii) as of July 1, 1998, such station was retransmitted by a satellite carrier under the statutory license of this section; and

(iii) the station is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States.

(6) Discrimination by a satellite carrier. Notwithstanding the provisions of paragraph (1), the willful or repeated secondary transmission to the public by a satellite carrier of [a] performance or display of a work embodied in a primary transmission made by a superstation or a network station is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier unlawfully discriminates against a distributor.

(7) Geographic limitation on secondary transmissions. The statutory license created by this section shall apply only to secondary transmissions to households located in the United States.

(8) Transitional signal intensity measurement procedures [Caution: See § 6(c) of Act Oct. 18, 1994, P.L. 103-369 (note to this section), for provision that this paragraph shall cease to be effective on December 31, 1996.].

(A) In general. Subject to subparagraph (C), upon a challenge by a network station regarding whether a subscriber is an unserved household within the predicted Grade B Contour of the station, the satellite carrier shall, within 60 days after the receipt of the challenge –

(i) terminate service to that household of the signal that is the subject of the challenge, and within 30 days thereafter notify the network station that made the challenge that service to that household has been terminated; or

(ii) conduct a measurement of the signal intensity of the subscriber's household to determine whether the household is an unserved household after giving reasonable notice to the network station of the satellite carrier's intent to conduct the measurement.

(B) Effect of measurement. If the satellite carrier conducts a signal intensity measurement under subparagraph (A) and the measurement indicates that –

(i) the household is not an unserved household, the satellite carrier shall, within 60 days after the measurement is conducted, terminate the service to that household of the signal that is the subject of the challenge, and within 30 days thereafter notify the network station that made the challenge that service to that household has been terminated; or

(ii) the household is an unserved household, the station challenging the service shall reimburse the satellite carrier for the costs of the signal measurement within 60 days after receipt of the measurement results and a statement of the costs of the measurement.

(C) Limitation on measurements.

(i) Notwithstanding subparagraph (A), a satellite carrier may not be required to conduct signal intensity measurements during any calendar year in excess of 5 percent of the number of subscribers within the network station's local market that have subscribed to the service as of the effective date of the Satellite Home Viewer Act of 1994.

(ii) If a network station challenges whether a subscriber is an unserved household in excess of 5 percent of the subscribers within the network station's local market within a calendar year, subparagraph (A) shall not apply to challenges in excess of such 5 percent, but the station may conduct its own signal intensity measurement of the subscriber's household after giving reasonable notice to the satellite carrier of the network station's intent to conduct the measurement. If such measurement indicates that the household is not an unserved household, the carrier shall, within 60 days after receipt of the measurement, terminate service to the household of the signal that is the subject of the challenge and within 30 days thereafter notify the network station that made the challenge that service has been terminated. The carrier shall also, within 60 days after receipt of the

measurement and a statement of the costs of the measurement, reimburse the network station for the cost it incurred in conducting the measurement.

(D) Outside the predicted Grade B Contour.

(i) If a network station challenges whether a subscriber is an unserved household outside the predicted Grade B Contour of the station, the station may conduct a measurement of the signal intensity of the subscriber's household to determine whether the household is an unserved household after giving reasonable notice to the satellite carrier of the network station's intent to conduct the measurement.

(ii) If the network station conducts a signal intensity measurement under clause (i) and the measurement indicates that –

(I) the household is not an unserved household, the station shall forward the results to the satellite carrier who shall, within 60 days after receipt of the measurement, terminate the service to the household of the signal that is the subject of the challenge, and shall reimburse the station for the costs of the measurement within 60 days after receipt of the measurement results and a statement of such costs; or

(II) the household is an unserved household, the station shall pay the costs of the measurement.

(9) Loser pays for signal intensity measurement; recovery of measurement costs in a civil action. In any civil action filed relating to the eligibility of subscribing households as unserved households –

(A) a network station challenging such eligibility shall, within 60 days after receipt of the measurement results and a statement of such costs, reimburse the satellite carrier for any signal intensity measurement that is conducted by that carrier in response to a challenge by the network station and that establishes the household is an unserved household; and

(B) a satellite carrier shall, within 60 days after receipt of the measurement results and a statement of such costs, reimburse the network station challenging such eligibility for any signal intensity measurement that is conducted by that station and that establishes the household is not an unserved household.

(10) Inability to conduct measurement. If a network station makes a reasonable attempt to conduct a site measurement of its signal at a subscriber's household and is denied access for the purpose of conducting the measurement, and is otherwise unable to conduct a measurement, the satellite carrier shall within 60 days notice thereof, terminate service of the station's network to that household.

(11) Service to recreational vehicles and commercial trucks.

(A) Exemption.

(i) In general. For purposes of this subsection, and subject to clauses (ii) and (iii), the term "unserved household" shall include –

(I) recreational vehicles as defined in regulations of the Secretary of Housing and Urban

Development under section 3282.8 of title 24 of the Code of Federal Regulations; and

(II) commercial trucks that qualify as commercial motor vehicles under regulations of the Secretary of Transportation under section 383.5 of title 49 of the Code of Federal Regulations.

(ii) Limitation. Clause (i) shall apply only to a recreational vehicle or commercial truck if any satellite carrier that proposes to make a secondary transmission of a network station to the operator of such a recreational vehicle or commercial truck complies with the documentation requirements under subparagraphs (B) and (C).

(iii) Exclusion. For purposes of this subparagraph, the terms "recreational vehicle" and "commercial truck" shall not include any fixed dwelling, whether a mobile home or otherwise.

(B) Documentation requirements. A recreational vehicle or commercial truck shall be deemed to be an unserved household beginning 10 days after the relevant satellite carrier provides to the network that owns or is affiliated with the network station that will be secondarily transmitted to the recreational vehicle or commercial truck the following documents:

(i) Declaration. A signed declaration by the operator of the recreational vehicle or commercial truck that the satellite dish is permanently attached to the recreational vehicle or commercial truck, and will not be used to receive satellite programming at any fixed dwelling.

(ii) Registration. In the case of a recreational vehicle, a copy of the current State vehicle registration for the recreational vehicle.

(iii) Registration and license. In the case of a commercial truck, a copy of –

(I) the current State vehicle registration for the truck; and

(II) a copy of a valid, current commercial driver's license, as defined in regulations of the Secretary of Transportation under section 383 of title 49 of the Code of Federal Regulations, issued to the operator.

(C) Updated documentation requirements. If a satellite carrier wishes to continue to make secondary transmissions to a recreational vehicle or commercial truck for more than a 2-year period, that carrier shall provide each network, upon request, with updated documentation in the form described under subparagraph (B) during the 90 days before expiration of that 2-year period.

(12) Statutory license contingent on compliance with FCC rules and remedial steps. Notwithstanding any other provision of this section, the willful or repeated secondary transmission to the public by ~~a~~ satellite carrier of a primary transmission embodying a performance or display of a work made by a broadcast station licensed by the Federal Communications Commission is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if, at the time of such transmission, the

satellite carrier is not in compliance with the rules, regulations, and authorizations of the Federal Communications Commission concerning the carriage of television broadcast station signals.

(b) Statutory license for secondary transmissions for private home viewing.

(1) Deposits with the Register of Copyrights. A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation –

(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations and network stations whose signals were transmitted, at any time during that period, to subscribers for private home viewing as described in subsections (a)(1) and (a)(2), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may from time to time prescribe by regulation; and

(B) a royalty fee for that 6-month period, computed by –

(i) multiplying the total number of subscribers receiving each secondary transmission of a superstation during each calendar month by 17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity

rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndex-proof as defined in section 258.2 of title 37, Code of Federal Regulations;

(ii) multiplying the number of subscribers receiving each secondary transmission of a network station or the Public Broadcasting Service satellite feed during each calendar month by 6 cents; and

(iii) adding together the totals computed under clauses (i) and (ii).

(2) Investment of fees. The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under paragraph (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing securities of the United States for later distribution with interest by the Librarian of Congress as provided by this title.

(3) Persons to whom fees are distributed. The royalty fees deposited under paragraph (2) shall, in accordance with the procedures provided by paragraph (4), be distributed to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Librarian of Congress under paragraph (4).

(4) Procedures for distribution. The royalty fees deposited under paragraph (2) shall be distributed in accordance with the following procedures:

(A) Filing of claims for fees. During the month of July in each year, each person claiming to be entitled to statutory license fees for secondary transmissions for private home viewing shall file a claim with the Librarian of Congress, in accordance with requirements that the Librarian of Congress shall prescribe by regulation. For purposes of this paragraph, any claimants may agree among themselves as to the proportionate division of statutory license fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) Determination of controversy; distributions. After the first day of August of each year, the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Librarian of Congress finds the existence of a controversy, the Librarian of Congress shall, pursuant to chapter 8 of this title [17 USCS §§ 801 et seq.], convene a copyright arbitration royalty panel to determine the distribution of royalty fees.

(C) Withholding of fees during controversy. During the pendency of any proceeding under this

subsection, the Librarian of Congress shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(c) Adjustment of royalty fees.

(1) Applicability and determination of royalty fees. The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective unless a royalty fee is established under paragraph (2) or (3) of this subsection.

(2) Fee set by voluntary negotiation.

(A) Notice of initiation of proceedings. On or before July 1, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B).

(B) Negotiations. Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees. Any such satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees. If the parties fail to identify common agents, the Librarian of Congress shall do so, after requesting recommendations from the parties to the negotiation proceeding. The parties to each negotiation proceeding shall bear the entire cost thereof.

(C) Agreements binding on parties; filing of agreements. Voluntary agreements negotiated at any time in accordance with this paragraph shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto. Copies of such agreements shall be filed with the Copyright Office within 30 days after execution in accordance with regulations that the Register of Copyrights shall prescribe.

(D) Period agreement is in effect. The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this paragraph shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1999, or in accordance with the terms of the agreement, whichever is later.

(3) Fee set by compulsory arbitration.

(A) Notice of initiation of proceedings. On or before January 1, 1997, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2). Such arbitration proceeding shall be conducted under chapter 8 [17 USCS §§ 801 et seq.].

(B) Establishment of royalty fees. In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 [17 USCS §§ 801 et seq.] shall establish fees for the retransmission of network stations and superstations that most clearly

represent the fair market value of secondary transmissions. In determining the fair market value, the panel shall base its decision on economic, competitive, and programming information presented by the parties, including –

(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

(ii) the economic impact of such fees on copyright owners and satellite carriers; and

(iii) the impact on the continued availability of secondary transmissions to the public.

(C) Period during which decision of arbitration panel or order of Librarian effective. The obligation to pay the royalty fee established under a determination which –

(i) is made by a copyright arbitration royalty panel in an arbitration proceeding under this paragraph and is adopted by the Librarian of Congress under section 802(f), or

(ii) is established by the Librarian of Congress under section 802(f), shall become effective as provided in section 802(g) or July 1, 1997, whichever is later.

(D) Persons subject to royalty fee. The royalty fee referred to in subparagraph (C) shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under paragraph (2).

(E), (F) [Repealed]

(G), (H) [Redesignated]

(4) Reduction.

(A) Superstation. The rate of the royalty fee in effect on January 1, 1998, payable in each case under subsection (b)(1)(B)(i) shall be reduced by 30 percent.

(B) Network and public broadcasting satellite feed. The rate of the royalty fee in effect on January 1, 1998, payable under subsection (b)(1)(B)(ii) shall be reduced by 45 percent.

(5) Public Broadcasting Service as agent. For purposes of section 802, with respect to royalty fees paid by satellite carriers for retransmitting the Public Broadcasting Service satellite feed, the Public Broadcasting Service shall be the agent for all public television copyright claimants and all Public Broadcasting Service member stations.

(d) Definitions. As used in this section –

(1) Distributor. The term "distributor" means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities.

(2) Network station. The term "network station" means –

(A) a television broadcast station, including any translator station or terrestrial satellite station that

rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or

(B) a noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934 [47 USCS § 397]);

except that the term does not include the signal of the Alaska Rural Communications Service, or any successor entity to that service.

(3) Primary network station. The term "primary network station" means a network station that broadcasts or rebroadcasts the basic programming service of a particular national network.

(4) Primary transmission. The term "primary transmission" has the meaning given that term in section 111(f) of this title.

(5) Private home viewing. The term "private home viewing" means the viewing, for private use in a household by means of satellite reception equipment which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission.

(6) Satellite carrier. The term "satellite carrier" means an entity that uses the facilities of a satellite or

satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.

(7) Secondary transmission. The term "secondary transmission" has the meaning given that term in section 111(f) of this title.

(8) Subscriber. The term "subscriber" means an individual who receives a secondary transmission service for private home viewing by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.

(9) Superstation. The term "superstation" –

(A) means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier; and

(B) except for purposes of computing the royalty fee, includes the Public Broadcasting Service satellite feed.

(10) Unserved household. The term "unserved household", with respect to a particular television network, means a household that –

(A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999;

(B) is subject to a waiver granted under regulations established under section 339(c)(2) of the Communications Act of 1934 [47 USCS § 339(c)(2)];

(C) is a subscriber to whom subsection (e) applies;

(D) is a subscriber to whom subsection (a)(11) applies; or

(E) is a subscriber to whom the exemption under subsection (a)(2)(B)(iii) applies.

(11) Local market. The term "local market" has the meaning given such term under section 122(j).

(12) Public Broadcasting Service satellite feed. The term "Public Broadcasting Service satellite feed" means the national satellite feed distributed and designated for purposes of this section by the Public Broadcasting Service consisting of educational and informational programming intended for private home viewing, to which the Public Broadcasting Service holds national terrestrial broadcast rights.

(e) Moratorium on copyright liability. Until December 31, 2004, a subscriber who does not receive a signal of Grade A intensity (as defined in the regulations of the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999, or predicted by the Federal Communications Commission using the Individual Location Longley-Rice methodology described by the Federal Communications Commission in Docket No. 98-201) of a local network television broadcast station shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber had satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999.

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47 U.S.C. § 339. Carriage of distant television stations by satellite carriers

(a) Provisions relating to carriage of distant signals.

(1) Carriage permitted.

(A) In general. Subject to section 119 of title 17, United States Code, any satellite carrier shall be permitted to provide the signals of no more than two network stations in a single day for each television network to any household not located within the local markets of those network stations.

(B) Additional service. In addition to signals provided under subparagraph (A), any satellite carrier may also provide service under the statutory license of

section 122 of title 17, United States Code, to the local market within which such household is located. The service provided under section 122 of such title may be in addition to the two signals provided under section 119 of such title.

(2) Penalty for violation. Any satellite carrier that knowingly and willfully provides the signals of television stations to subscribers in violation of this subsection shall be liable for a forfeiture penalty under section 503 in the amount of $50,000 for each violation or each day of a continuing violation.

(b) Extension of network nonduplication, syndicated exclusivity, and sports blackout to satellite retransmission.

(1) Extension of protections. Within 45 days after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999 [enacted Nov. 29, 1999], the Commission shall commence a single rulemaking proceeding to establish regulations that –

(A) apply network nonduplication protection (47 CFR 76.92) syndicated exclusivity protection (47 CFR 76.151), and sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and

(B) to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers.

(2) Deadline for action. The Commission shall complete all actions necessary to prescribe regulations

required by this section so that the regulations shall become effective within 1 year after such date of enactment.

(c) Eligibility for retransmission.

(1) Signal standard for satellite carrier purposes. For the purposes of identifying an unserved household under section 119(d)(10) of title 17, United States Code, within 1 year after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999 [enacted Nov. 29, 1999], the Commission shall conclude an inquiry to evaluate all possible standards and factors for determining eligibility for retransmissions of the signals of network stations, and, if appropriate –

(A) recommend modifications to the Grade B intensity standard for analog signals set forth in section 73.683(a) of its regulations (47 CFR 73.683(a)), or recommend alternative standards or factors for purposes of determining such eligibility; and

(B) make a further recommendation relating to an appropriate standard for digital signals.

(2) Waivers. A subscriber who is denied the retransmission of a signal of a network station under section 119 of title 17, United States Code, may request a waiver from such denial by submitting a request, through such subscriber's satellite carrier, to the network station asserting that the retransmission is prohibited. The network station shall accept or reject a subscriber's request for a waiver within 30 days after receipt of the request. The subscriber shall be permitted to receive such retransmission under section 119(d)(10)(B) of title 17,

United States Code, if such station agrees to the waiver request and files with the satellite carrier a written waiver with respect to that subscriber allowing the subscriber to receive such retransmission. If a television network station fails to accept or reject a subscriber's request for a waiver within the 30-day period after receipt of the request, that station shall be deemed to agree to the waiver request and have filed such written waiver.

(3) Establishment of improved predictive model required. Within 180 days after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999 [enacted Nov. 29, 1999], the Commission shall take all, actions necessary, including any reconsideration, to develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations to receive signals in accordance with the signal intensity standard in effect under section 119(d)(10)(A) of title 17, United States Code. In prescribing such model, the Commission shall rely on the Individual Location Longley-Rice model set forth by the Federal Communications Commission in Docket No. 98-201 and ensure that such model takes into account terrain, building structures, and other land cover variations. The Commission shall establish procedures for the continued refinement in the application of the model by the use of additional data as it becomes available.

(4) Objective verification.

(A) In general. If a subscriber's request for a waiver under paragraph (2) is rejected and the subscriber submits to the subscriber's satellite carrier a request for a test verifying the subscriber's inability to receive a signal

that meets the signal intensity standard in effect under section 119(d)(10)(A) of title 17, United States Code, the satellite carrier and the network station or stations asserting that the retransmission is prohibited with respect to that subscriber shall select a qualified and independent person to conduct a test in accordance with section 73.686(d) of its regulations (47 CFR 73.686(d)), or any successor regulation. Such test shall be conducted within 30 days after the date the subscriber submits a request for the test. If the written findings and conclusions of a test conducted in accordance with such section (or any successor regulation) demonstrate that the subscriber does not receive a signal that meets or exceeds the signal intensity standard in effect under section 119(d)(10)(A) of title 17, United States Code, the subscriber shall not be denied the retransmission of a signal of a network station under section 119 of title 17, United States Code.

(B) Designation of tester and allocation of costs. If the satellite carrier and the network station or stations asserting that the retransmission is prohibited are unable to agree on such a person to conduct the test, the person shall be designated by an independent and neutral entity designated by the Commission by rule. Unless the satellite carrier and the network station or stations otherwise agree, the costs of conducting the test under this paragraph shall be borne by the satellite carrier, if the station's signal meets or exceeds the signal intensity standard in effect under section 119(d)(10)(A) of title 17, United States Code, or by the network station, if its signal fails to meet or exceed such standard.

(C) Avoidance of undue burden. Commission regulations prescribed under this paragraph shall seek to avoid any undue burden on any party.

(d) Definitions. For the purpose of this section:

(1) Local market. The term "local market" has the meaning given that term under section 122(j) of title 17, United States Code.

(2) Nationally distributed superstation. The term "nationally distributed superstation" means a television broadcast station, licensed by the Commission, that –

(A) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States;

(B) on May 1, 1991, was retransmitted by a satellite carrier and was not a network station at that time; and

(C) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code.

(3) Network station. The term "network station" has the meaning given such term under section 119(d) of title 17, United States Code.

(4) Satellite carrier. The term "satellite carrier" has the meaning given such term under section 119(d) of title 17, United States Code.

(5) Television network. The term "television network" means a television network in the United States

which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States.